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100

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS.

With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. VIII.

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EASTER TERM, 2 WILLIAM IV. 1832,
BOTH INCLUSIVE.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

**The Right Hon. Sir NICHOLAS CONYNTHAM
TINDAL, Knt. Ld. Ch. J.**

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt. . . .

Hon. Sir JOHN BERNARD BOSANQUET, Knt.

Hon. Sir EDWARD HALL ALDERSON, Knt.

CORRIGENDUM.

Page 394. line 6. of the marginal note, for "Benefit Society" read "Savings Bank."

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ARGUED AND DETERMINED

1891.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Second Year of the Reign of WILLIAM IV.

DEVENOGE v. BOUVERIE.

Nov. 2.

THE Plaintiff had obtained a rule *nisi* for the Defendant to produce; and for the Plaintiff to inspect and take a copy of, an indenture between the Plaintiff and Defendant, bearing date *October 11th, 1814.*

An annuity deed, of which there was no counterpart, was placed in the hands of R., as agent for grantor and grantee. R. received the annuity for grantee. The grantor re-

By this deed the Defendant, in consideration of 650*l.*, had granted an annuity to the Plaintiff of 100*l.* a year; and there being no counterpart, the deed was, as the Plaintiff deposed, placed in the hands of one *Riley*, the solicitor concerned for the Defendant and on behalf of grantor. The grantor deemed the annuity by paying the amount of the purchase money to R., who, without express authority from the grantee, delivered the deed to grantor to be cancelled. R. having absconded without paying the grantee, and the grantee having sued grantor for arrears, Held, that he was entitled to call for an inspection of the deed.

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 v.
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all parties, on an understanding that he should receive the annuity on the part of the Plaintiff.

In 1816 the Defendant redeemed the annuity, by paying the amount of the purchase-money into the hands of *Riley*, when *Riley* delivered up the deed to him to be cancelled without any express authority from the Plaintiff.

Riley never disclosed this to the Plaintiff, but continued to pay the annuity till 1830, when he absconded; and the annuity being no longer paid, the Plaintiff commenced this action on the deed.

On the part of the Defendant it was sworn that the deed was prepared by *Riley*, and placed in his hands as agent of the Plaintiff, and not as solicitor of the Defendant.

Merewether Serjt., who shewed cause, contended that this was not a case in which the Court would summarily assist the Plaintiff. The deed was lawfully in possession of the Defendant, upon payment of the purchase-money to the Plaintiff's agent, who had authority to receive it, as might be inferred from the fact of his holding the deed, and receiving the annuity for the Plaintiff. The parties being both innocent, *potior est conditio possidentis*; and the rather, as there had been laches on the part of the Plaintiff, in not watching more closely the conduct of his agent.

Wilde Serjt. The laches is on the part of the Defendant, in redeeming the annuity without communication with the principal, or requiring his written discharge. *Riley* held the deed as trustee for both parties. In his hands the Plaintiff would have been entitled to an inspection; and the Defendant having obtained the deed without authority, cannot now deprive the Plaintiff of his right.

TINDAL

1831.

THORNTON v. HORNBY.

Nov. 4.

THIS cause, and all matters in difference between the parties, had been referred to the arbitration of a surveyor. Costs to abide the event. The Defendant had paid 600*l.* into court.

The arbitrator awarded that the Defendant had overpaid the Plaintiff 34*l.*

Upon reference to a surveyor of a cause and all matters in difference, an award that Defendant had overpaid Plaintiff 34*l.*, Held, not sufficient to entitle the Plaintiff to enforce the award by attachment.

Jones Serjt., in shewing cause against a rule for an attachment, objected that this award was not final, and was void for uncertainty. The arbitrator should have disposed of the cause and of the matters in difference separately. The 34*l.* might have been overpaid upon a general balance of other matters in difference, and the Plaintiff might have been unpaid as to the matter contested in this action, and entitled to the verdict and costs, which he might levy separately: *Highgate Archway Company v. Nash*. (a) If the 34*l.* was to be taken as overpaid in the action, then there was no adjudication upon the other matters in difference. In *Randall v. Randall* (b), where various matters were referred to an arbitrator, it was held he must adjudicate upon all.

Andrews Serjt., for the Plaintiff, contended that the award was sufficient, it not appearing that any matters save those in the cause had come before the arbitrator. The award amounted in effect to a finding that the Plaintiff had no cause of action.

(a) 2 B. & A. 537.

(b) 7 East, 81.

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THORNTON
v.
HORNEY.

The Court took time to consider, and now thought there was sufficient doubt on the face of the award to justify the refusal of an attachment, and to leave the Plaintiff to his remedy by action.

Rule discharged.

Nov. 5.

PLANCHÈ v. COLBURN and Another.

Defendants engaged Plaintiff to write a treatise for a periodical publication.

Plaintiff commenced the treatise, but before he had completed it, the Defendants abandoned the periodical publication: Held, that Plaintiff might sue for compensation, without tendering or delivering the treatise.

THE Defendants had commenced a periodical publication, under the name of "The Juvenile Library," and had engaged the Plaintiff to write for it a volume upon Costume and Ancient Armour. The declaration stated, that the Defendant had engaged the Plaintiff for 100*l.* to write this work for publication in "The Juvenile Library;" and alleged for breach, that though the author wrote a part, and was ready and willing to complete and deliver the whole for insertion in that publication, yet that the Defendants would not publish it there, and refused to pay the Plaintiff the sum of 100*l.*, which they had previously agreed he should receive. There were then the common counts for work and labour.

At the trial before *Tindal C. J.*, *Middlesex* sittings after last term, it appeared that the Plaintiff, after entering into the engagement stated in the declaration, commenced and completed a considerable portion of the work; performed a journey to inspect a collection of ancient armour, and made drawings therefrom; but never tendered or delivered his performance to the Defendants, they having finally abandoned the publication of "The Juvenile Library," upon the ill success of the early numbers of the work. An attempt was made
to

to shew that the Plaintiff had entered into a new contract.

The Chief Justice left it to the jury to say, whether the work had been abandoned by the Defendants, and whether the Plaintiff had entered into any new contract; and a verdict having been found for him, with 50% damages,

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PLANCHÉ
v.
COLBURN.

Spankie Serjt. moved to set it aside, on the ground that the Plaintiff could not recover on the special contract, for want of having tendered or delivered the work pursuant to the contract; and he could not resort to the common counts for work and labour, when he was bound by the special contract to deliver the work. If the Plaintiff had delivered the work, or so much of it as he had completed at the time "The Juvenile Library" was abandoned, the Defendants might have turned it to account in some other way.

TINDAL C. J. In this case a contract had been entered into for the publication of a work on Costume and Ancient Armour in "The Juvenile Library." The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The fact was, that the Defendants not only suspended, but actually put an end to, "The Juvenile Library;" they had broken their contract with the Plaintiff; and an attempt was made, but quite unsuccessfully, to shew that the Plaintiff had

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 {
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 v.
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had afterwards entered into a new contract to allow them to publish his book as a separate work.

I agree that, when a special contract is in existence and open, the Plaintiff cannot sue on a *quantum meruit* : part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was finally abandoned ; and the jury found that no new contract had been entered into. Under these circumstances the Plaintiff ought not to lose the fruit of his labour ; and there is no ground for the application which has been made.

GASELEE J. concurred.

BOSANQUET J. The Plaintiff is entitled to retain his verdict. The jury have found that the contract was abandoned ; but it is said that the Plaintiff ought to have tendered or delivered the work. It was part of the contract, however, that the work should be published in a particular shape ; and if it had been delivered after the abandonment of the original design, it might have been published in a way not consistent with the Plaintiff's reputation, or not at all.

ALDERSON J. concurred, and the learned Serjeant
 Took nothing.

TINDAL C. J. It would be of no advantage to the Defendant if the Court were to discharge this rule: a little evidence would be sufficient to launch the Plaintiff's case; and if he fell into a variance, it would probably be of such a nature as a Judge might at once correct under the provisions of the late act.

The case, however, falls within the ordinary rule, which entitles a party to the inspection of a deed placed in the hands of one as trustee for several. Although the Defendant denies that *Riley* was an agent for him alone, it is not denied that he was agent for both parties, and that agrees with the probabilities of the case; for there was but one part of the deed, and it was probable that it should be held for the use of both. But take it that *Riley* was agent for the Plaintiff alone: it is not shewn that he had authority to receive the redemption money, or to surrender the deed; the Defendant, therefore, cannot withhold a deed which he has obtained without authority. The want of caution is rather on the side of the Defendant, in paying without any regular discharge from the Plaintiff, than on the part of Plaintiff, who had no reason for enquiry as long as he received his annuity regularly.

GASELEE J. I think the rule ought to be made absolute. It is clear that *Riley* was the agent of the Defendant; for the deed was prepared on his part by *Riley*, and it never came to the hands of the Plaintiff.

BOSANQUET J. According to the well established practice, the Plaintiff is entitled to the inspection of this deed. Both parties were interested in the deed, of which only one part was executed, and that part was placed in the hands of a third person, as agent for both. It has now come to the hands of the Defendant, as it is suggested, by his redeeming the annuity; but whether

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he obtained it with or without the authority of the Plaintiff, is the question to be tried by a jury.

ALDERSON J. concurring, the rule was made

Absolute.

Nov. 3.

KING, Demandant ; GIBSON, Deforciant.

A fine on paper from *Jamaica*, where no parchment could be procured, allowed to pass, being copied on parchment and attached thereto.

THIS was a fine from *Jamaica* on paper, and on the margin of the acknowledgment it was signified that no parchment could be procured.

Wilde Serjt. moved that the fine might pass, although the practice of the Court required that it should be engrossed on parchment. In many cases the Court had departed from its strict rules where circumstances rendered the observance of them impracticable; as in *Seton v. Sinclair* (a), where the affidavit of due acknowledgment was not made by an attorney, there being no attorney for the party to resort to; and in *Price, demandant, Williams, tenant* (b), where there was no notarial seal.

Per Curiam. Let the fine be copied on parchment, and the paper being attached, it may pass.

(a) 2 *W. Blacks.* 880.

(b) 4 *Taunt.* 573.

1831.

WILLATTS v. JAMES KENNEDY.

Nov. 3.

THE Plaintiff had obtained a verdict upon the second count of his declaration, which stated that *Charles Kennedy*, before and at the time of the making of the promise and undertaking of the Defendant thereafter next mentioned, was indebted to certain persons, commonly called and known by the style and firm of *Boeme and Smout*, in a certain sum of money, to wit, 25*l.* 2*s.*, to wit, at, &c.; that the Plaintiff, before and at the time of the making of the said promise and undertaking, and while the said *C. Kennedy* was so indebted as aforesaid, had been appointed by the High Court of Chancery receiver of the debts and monies then due and owing to the said firm, to wit, at, &c. by means whereof the said *C. Kennedy* then and there became liable to pay to him, the Plaintiff, as such receiver, the said sum of money so by him the said *C. Kennedy* due to the said firm as aforesaid, when he, *C. Kennedy*, should be thereunto requested, to wit, at, &c.; and thereupon, and whilst the Plaintiff was such receiver as aforesaid, and the said *C. Kennedy* was so liable as aforesaid, to wit, on, &c. at, &c. in consideration of the last-mentioned premises, and that the Plaintiff, as such receiver as aforesaid, at the special instance and request of the Defendant, would not adopt any legal proceedings against the said *C. Kennedy* for the recovery of the said sum in which the said *C. Kennedy* was so indebted to the said firm as aforesaid, for a period of two months thence next following, to wit, until the 25th day of *January*, which should be in the

Declaration, that *C. K.* was indebted to the firm of *B. and S.*; that Plaintiff had been appointed by the Court of Chancery receiver of the debts of the firm, whereby *C. K.* became liable to pay Plaintiff when requested; that in consideration of the premises, and that the Plaintiff as such receiver would give *C. K.* two months' time to pay, Defendant promised to pay in case *C. K.* omitted to do so within that time. Breach, that *C. K.* omitted, and that Defendant never paid: Held, on arrest of judgment, that sufficient consideration

authority appeared for the Plaintiff to contract and sue, and sufficient consideration for the Defendant's promise.

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year 1830, the Defendant undertook, and then and there faithfully promised the Plaintiff, as such receiver as aforesaid, to pay him the said last-mentioned sum of 25*l.* 2*s.* at the expiration of the said last-mentioned period, to wit, on, &c. at, &c. should the said debt so due from *C. Kennedy* to the said firm as aforesaid be then unpaid. And the Plaintiff averred that he, confiding in the said promise and undertaking of the Defendant, did not adopt any legal proceedings against the said *C. Kennedy* for the recovery of the said sum in which the said *C. Kennedy* was so indebted to the said firm as aforesaid for the said period of two months, to wit, until, &c. at, &c.; but that the said *C. Kennedy*, although he was afterwards, to wit, on, &c. at, &c. requested so to do, did not, nor would pay the said sum of money, or any part thereof, to the Plaintiff as such receiver, or to the said firm, or to any other person on their behalf, but altogether refused and neglected so to do, to wit, at, &c. And the same debt so due from the said *C. Kennedy* to the said firm was at the expiration of the said last-mentioned period, to wit, on, &c. wholly unpaid, to wit, at, &c. whereof the Defendant afterwards, to wit, on, &c. there had notice; and thereby, and according to the tenor and effect of his said promise and undertaking, he the Defendant then and there became liable to pay to the Plaintiff as such receiver the said sum of 25*l.* 2*s.*, on the same day and year aforesaid, to wit, at, &c.

Cross Serjt. obtained a rule *nisi* to arrest the judgment, on the ground that there was no consideration for the Defendant's promise, and that the Plaintiff had no authority to enter into or sue on such a contract as that on which he had declared.

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KENNEDY.

Wilde Serjt. shewed cause. The Plaintiff, as receiver appointed by the Court of Chancery, had authority to collect and sue for the debts of the firm (*Wynne v. Lord Newborough* (a), and, as incidental to that authority, to press or suspend payment according to a reasonable discretion; for by a judicious forbearance he might collect more than by immediate urgency. After verdict it must be assumed that his authority was duly proved at the trial. If he had authority to suspend as well as to enforce payment, he had authority to enter into a contract such as the present, by which the suspension is accorded on terms favourable to the principal creditors, namely, the advantage of security for the debt. Then, the Plaintiff having authority to make the contract, is the only person who can sue on it. He is not agent of the creditors, but rather appointed to control them, and is clothed with an independent right. No other could sue; and payment, even to the creditors, would have been no discharge. Forbearance is a good consideration; for the Plaintiff was responsible for the result, and that responsibility might turn out to his detriment. If, however, his responsibility were a matter of doubt, and an advantage were gained by a concession as to the disputable point, that is a sufficient consideration. *Longridge v. Dorville* (b), *Stracy v. Bank of England*. (c)

Cross. The Plaintiff merely styles himself receiver appointed by the Court of Chancery; an office of which a court of law can take no notice. If, however, the office be recognized, the Plaintiff's duty was simply to collect debts, not to enter into contracts for the forbearance of them, or to engage in suits to enforce

(a) 1 Ves. jun. 164.

(c) 6 Bingb. 754.

(b) 5 B. & A. 117.

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such contracts. And there is no consideration for the Defendants' promise; since the verdict in this action would be no answer to an action in the name of the original creditor against *C. Kennedy*.

TINDAL C. J. I think there is no ground for arresting the judgment on the second count in this declaration. The count states that one *Charles Kennedy* was indebted to the firm of *Boeme and Smout* in the sum of 25*l.* 2*s.*; that the Plaintiff was appointed by the High Court of Chancery receiver of the debts due to the firm; whereby *Charles Kennedy* became liable to pay the Plaintiff, as such receiver, the said sum of money, when he should be thereunto requested: there is, therefore, a distinct allegation of *C. Kennedy's* liability to pay the Plaintiff when requested. It is objected, however, that this Court cannot take judicial notice of the office of receiver; but after verdict we may assume that it was proved the Plaintiff had a right to enforce payment to himself in the capacity of receiver. And, as to the objection that there is no consideration for the Defendant's promise, it is sufficient to observe that the Plaintiff did not interfere as a stranger in the concerns of the firm for which he was appointed receiver: it was his duty to require the debtor to pay, and the duty of the debtor to pay him. The contract, therefore, to forbear to proceed against the debtor was a contract from which the Plaintiff might incur a detriment; and it is a sufficient consideration for a contract if one party receives a benefit or the other is exposed to a detriment from it. We must assume it to have appeared that a receiver is liable to answer to the Court of Chancery, and that therefore it might be a detriment to him to give time, where his duty in the first instance was to require payment. *Boeme and Co.* could not have

have put this matter in suit against the Defendant; and it would be too much to say that he should be answerable neither to the receiver nor to the creditor. After verdict the Plaintiff is sufficiently connected with the cause of action; there is no ground for considering him a stranger; and the rule therefore must be discharged.

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GASELEE J. I am of the same opinion. A receiver must have a reasonable discretion; and if he exercises it as in the present instance, it is not for this Court to say he has done wrong. He is responsible to the court by which he was appointed. By giving time he has incurred a responsibility, which is a sufficient detriment to form the consideration for the Defendant's promise.

BOSANQUET J. There is no ground for arresting the judgment in this case. It has been objected that the Plaintiff has no authority to sue: but the contract in question was made by him in his character of receiver, and not as agent of the creditors, and in his character of receiver he is entitled to sue. As to the objection that a receiver has no authority to exercise forbearance towards a debtor, he must exercise a reasonable discretion, and such forbearance is not of itself incompatible with his duty as receiver. Here he agrees to forbear if a third person will give security, which is an advantage to the creditors, and a reasonable exercise of discretion. That forbearance too was an advantage to the debtor, and was a sufficient consideration for the Defendant's promise.

ALDERSON J. I am of the same opinion. *James Kennedy* obtains time for *Charles Kennedy*, on an undertaking to pay in case *Charles* should omit to do so. That is a sufficient consideration for *James Kennedy's* promise;

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promise; and the jury might reasonably presume that the Plaintiff had authority to do that which the Defendant requested him to do.

Rule discharged.

Nov. 4.

HAMILTON, Demandant; FARRER, Tenant;
 WILSON, Vouchee.

Recovery
 amended by
 transposing the
 names of
 demandant
 and tenant.

RUSSELL Serjt. moved to amend this recovery, suffered at bar in *Michaelmas* term 1782, by reversing the names of demandant and tenant, pursuant to the deed to make the tenant to the *præcipe*, which bore date *November* 27. 1782, and the deed to lead the uses, which bore date *January* 3. 1782, and according to which *Farrer* was to be demandant and *Hamilton* tenant. Possession had gone according to the deed ever since.

Russell relied on *Lord*, demandant, *Biscoe*, tenant (a), *Roberts*, demandant, *Robinson*, tenant (b), in which the same amendment had been made; and *Loggin*, demandant, *Rawlins*, tenant (c), where the principle on which such amendments are allowed is stated to be the statute of 8 *Hen.* 6. to amend the misprision of the clerk. Upon that principle the amendment of inserting "all tithes" was allowed in *Dowse*, demandant, *Lloyd*, tenant (d) and *Milbank v. Jolliffe*, there cited.

In *Michaelmas* term 1830 the Court allowed the amendment now required, in a recovery in which *Rose* was demandant, *Frowd* tenant.

(a) *Barnes*, 24.
 (b) 2 *Taunt.* 222.

(c) *Barnes*, 27.
 (d) 2 *B. & P.* 578.

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HAMILTON,
Demandant;
FARRER,
Tenant.

Wilde Serjt. opposed the application, on the ground that this recovery was suffered at bar; and the deed to create a tenant to the *præcipe* bearing a date subsequent to the first day of the term in which the recovery was suffered, to which day the judgment had relation, it could not operate in support of the recovery. The rule, therefore, as to collecting the intention of the parties from the deed, did not apply. The recovery at bar was accomplished according to the intention of the parties; and the mistake was not there, but in the deed. If so, the recovery wholly failed; for the tenant had no estate in him at the time of the recovery; and the statute 14 G. 2. c. 20. s. 6., which enacts that a recovery shall be good though the deed be executed after judgment, provided it be executed within the same term, applies only to cases where the person joining in the recovery has a sufficient estate in him to suffer the same. To put the demandant in his place, without any writing to warrant such a proceeding, would be, not to amend, but to substitute a new recovery, and to falsify the records of the court; it would, in effect, alter the warrant of attorney, which the Court has always refused to do. The cases referred to in support of the application passed without opposition, and perhaps without discussion; but in *Allen, demandant, Hesley, tenant* (a), the Court refused to make the amendment now required.

Russell. In that case certain documents were called for by the Court; and, as they were not produced, there might have been reason for suspecting fraud.

TINDAL C J. I think that this amendment ought to be allowed, and that in allowing it we violate no general rule of law, while we carry into effect the obvious intention of the parties. That a recovery was intended

(a) 6 B. M. 46.

1881.

HAMILTON,
Demandant;
FARRER,
Tenant.

to be suffered, and the *dramatis personæ* assigned, is admitted; and the only question is, whether the formal parts of the proceeding are sufficient after fifty years' possession in conformity with the intention of the parties. In support of that intention so evinced, can we allow the names of the demandant and tenant to be transposed? *Lord, demandant, Biscoe, tenant*, is an authority in point, and a decision where the application was opposed. But it is said, that in that case the deed to make the tenant to the *præcipe* was anterior to the recovery, so that there was something to amend by. It is true that here the deed bears date the 27th of *November*: it may, however, have been executed at any time before: but if it were executed on the day it bears date, not more than three weeks could have elapsed from the time of the recovery; and by the statute 14 G. 2. c. 20. s. 6., a deed executed subsequently to the recovery, in the same term, is put on the same footing as a deed executed before. So that this case falls within the principle of the case in *Barnes*; and we are glad that any ground can be found to support a possession of fifty years, and the manifest dictates of justice.

GASELEE J. Consistently with the facts alleged, the deed may have been executed by the tenant in tail before the day of its date; so that there may be no necessity for recurring to the statute of 14 G. 2.

BOSANQUET J. concurred in the propriety of the amendment.

ALDERSON J. We should be very anxious to grant this amendment where the parties clearly intended to effect a valid recovery; and the only error is of the same nature as putting *John Doe* by mistake for *Richard Roe*.

Fiat.

1831.

COBBETT and Others, Assignees of BAKER, a
Bankrupt, v. COCHRANE. Nov. 10.

THE Plaintiffs declared, as assignees of the bankrupt *Baker*, for the amount of goods sold by him to Defendant; and alleged as a breach, that the Defendant had not paid *Baker* or the Plaintiffs, "assignees as aforesaid."

Demurrer, that the damage was not alleged to have accrued to the Plaintiffs, *as* assignees as aforesaid, and that the Plaintiffs had shewn no cause of action in any other character.

Merewether Serjt. in support of the demurrer, referred to *Bridgen v. Parkes* (a), and *Henshall v. Roberts*. (b)
But

The Court thought there was nothing in the objection, for the words "*assignees as aforesaid*" might be rejected as surplusage.

Judgment for Plaintiffs.

(a) 2 B. & P. 424.

(b) 5 East, R. 150.

1831.

Nov. 11. **BOOTY, Demandant; CAMERON, Tenant; North, and Three Others, Vouchees.**

IN this recovery there were four vouchees, three of whom appeared in court; the fourth, who resided in *Jamaica*, had executed a warrant, in which he was the only vouchee named.

The officer of the Court, thinking that all four ought to have been named in that warrant, otherwise it did not appear to be the same recovery,

Taddy Serjt. moved that the recovery might pass, contending that the warrant was sufficient, as not being incompatible with a recovery in which four were vouched, and referred to *Simmons* and three others, vouchees (*a*), as an authority in point.

The Court thought the warrant was not in the regular form, but on the authority of the case referred to, acceded to the application.

Fiat.

(*a*) 11 *B. Moore*, 485.

MARKHAM, Plaintiff; BAYLEY, Deforciant.

THIS fine was taken in the *West Indies*, by commissioners under a *dedimus potestatem* duly acknowledged: the *præcipe* and concord were signed by the commis-

commissioners, and the usual affidavit made by one of them; but one of the commissioners omitted to endorse his name on the *dedimus*.

1831.

MARKHAM,
Plaintiff;
BAYLEY,
Deforcient.

Scriven Serjt. moved that the fine might pass notwithstanding.

Fiat.

HEPWORTH v. SANDERSON.

Nov. 12.

THE Plaintiff in this cause having obtained a rule calling on the bailiff of the liberty of *Langborough* (*Yorkshire*) to make a return to the sheriff's mandate for the capture of the Defendant under a *ca. sa.*;

Wilde Serjt. moved to discharge this rule, on an affidavit, which stated that, upon the commissioner of the insolvent debtors' court making his last visit to *York*, the constable of *York Castle* had certified that the Defendant was in his custody at the suit of the Plaintiff; that the Defendant had been duly discharged under the insolvent debtors' act, and that the Plaintiff, the sole creditor, had afterwards been appointed assignee of his estate and effects.

Jones Serjt., on the part of the Plaintiff, contended that this was no answer to the rule for the officer of the liberty to return the mandate. The officer of the liberty was guilty of a violation of his duty in transferring the Defendant to the custody of the sheriff. In *Boothman v. Earl of Surry* (a) it was held, that the bailiff of a liberty, who had the return and execution of writs, was

Plaintiff issued a mandate to the officer of a liberty, to arrest the Defendant on a *ca. sa.* Defendant was afterwards discharged, under the insolvent debtors' act, from the custody of the sheriff of the county. The Plaintiff having become the assignee under the discharge, Held, that he was estopped to rule the officer of the liberty to return the mandate for the capture of the Defendant.

(a) 2 T. R. 5.

C 2

liable

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liable to an action of debt for an escape, if he removed a prisoner taken in execution to the county gaol, situate out of the liberty, and there delivered him into the custody of the sheriff; and the Plaintiff's acceptance of the office of assignee, which is a trust for the benefit of a general body of creditors, was no waiver of any claim he might have, as an individual, against the officer of the liberty for misconduct anterior to the date of the assignment.

TINDAL C. J. The Plaintiff in this action has obtained the ordinary rule, calling on the officer of a liberty to return the mandate of the sheriff for taking the Defendant into custody upon a *capias ad satisfaciendum*. A rule has since been obtained to discharge the rule for compelling a return to the mandate; and we think this latter rule should be made absolute. There are many cases in which a plaintiff is not entitled to call for the return of a writ; as where he has taken an assignment of the bail-bond, or has otherwise so conducted himself as to shew that he is contented. Thus, when he has acted as his own bailiff, or when, after an arrest, he has met the defendant and accepted a sum in discharge of all claims, can he call for a return of the writ? Put the case of the bankruptcy of the defendant, and the plaintiff becoming his assignee, could he sue the sheriff and obtain a separate compensation? The merits are the same here; for after the arrest, the Plaintiff consents to become assignee under the insolvent debtors' act, and has all the Defendant's property; he is estopped, therefore, to go into the question of escape, which, at all events, is an escape in law only, and not in fact. After becoming a party to the deed of assignment, which would not have been made, unless the Defendant had been in custody and discharged, the Plaintiff has admitted that the custody was an existing legal custody; he

he ought not, therefore, still remaining assignee, to call for this return in the face of his own admission.

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HERWORTH
v.
SANDERSON.

GASELEE J. The assignment to the Plaintiff is subsequent to the discharge of the Defendant, and that is decisive. The Defendant's petition shews where he is in custody, and his schedule, for what debts. The Plaintiff, therefore, must have been aware of all the circumstances when he consented to become assignee.

BOSANQUET and ALDERSON Js. concurring, the rule for discharging the rule for a return was made

Absolute.

SHERLOCK v. BARNED.

Nov. 12.

UPON the first trial of this cause the Plaintiff obtained a verdict, which the Defendant moved to set aside, on the ground of an alleged misdirection of the Judge. The Court directed a new trial, and by the terms of the rule the costs of the former trial were to abide the event.

The Defendant having obtained a verdict on the new trial, the prothonotary allowed him the costs of that trial only; whereupon

When the costs of the former trial are to abide the event of a new trial, if the same party succeeds on the new trial, he has the costs of both trials; if a different party, he has only the costs of the new trial.

Wilde Serjt. obtained a rule for the prothonotary to review his taxation, and allow the costs of the former trial also.

Jones Serjt., who shewed cause, contended, that by the practice of both Courts, when the costs of the for-

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 SHERLOCK
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 BARNED.

mer trial were to abide the event, if the same party succeeded on both trials he had the costs of both; if a different party, he had only the costs of the last trial. *Chapman v. Partridge.* (a)

Wilde. In *Chapman v. Partridge* the Court said, that the words of the rule ought to be construed with reference to the question which must have been depending, namely, whether the new trial should be granted upon payment of the costs of the first by the defendant; and upon that principle proceeded the decision in *Brown v. Boyn.* (b) Here, the Plaintiff, having obtained the first verdict through the misdirection of the Judge, was not entitled to exact the costs of the first trial as the condition of allowing the Defendant to go down again; and the Defendant having now established that the Plaintiff never had any cause of action, ought, in justice, to be indemnified for all the expense he has incurred. With reference to the question here, the rule, that the costs of the former trial shall abide the event, must be construed as a sort of bargain made with the Defendant to ensure him ultimately against the vexation of an unfounded suit.

TINDAL C. J. We ought to adhere to the rule generally received in this Court, and universally in the Court of King's Bench, that a party who succeeds on a second trial, not having succeeded on the first, is entitled to the costs of the second trial only. There has been no bargain here to take the case out of the ordinary rule. A misdirection was alleged, and the Court feeling a doubt, sent the case down for a second enquiry. The Defendant was put under these terms to ensure to the Plaintiff the costs of both trials, in case the verdict should be the

(a) 2 N. R. 382.

(b) 5 B. M. 309.

same way a second time; for a party does not pay the costs of a trial on which he succeeds.

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SHERLOCK
v.
BARNED.

GASELEE J. There never has been any variance between the practice of the two courts on a rule worded like this; and if there were any bargain between these parties to a different effect, it ought to have been clearly expressed.

BOSANQUET J. concurred.

ALDERSON J. The condition that the costs of the former trial shall abide the event, is a condition in favour of the party against whom the rule for a new trial is granted. The party applying for a new trial must take it on any terms which the Court may think fit to impose. The party against whom the application is made is already in a favourable position, and can scarcely be called on to pay costs for his success.

Rule discharged.

POWELL v. EASON.

Nov. 14.

THE Defendant had been discharged under the insolvent debtors' act in *February* 1830.

The Plaintiff, as a surety, had joined the Defendant in a promissory note to one *Bell*, which became due before the Defendant had filed his schedule in order to his discharge. The schedule specified the debt to *Bell*.

This note, the Plaintiff, after the Defendant's discharge, was called on to pay, and having paid it in

A discharged insolvent is not exonerated from the claim of a surety, who pays, subsequently to the discharge, a debt due before.

1831.

POWELL
v.
EASON.

December 1830, sought by this action to recover the amount from the Defendant. The Defendant had inserted the Plaintiff's name and the amount of the promissory note in his schedule.

A verdict having been obtained for the Plaintiff,

Adams Serjt. obtained a rule *nisi* to set it aside, on the ground that the Defendant, by his discharge under the insolvent debtors' act, was exonerated from any such demand.

Wilde Serjt. was to have shewn cause, but the Court called on

Adams to support his rule. He contended that the general object of the insolvent debtors' act, 7 G. 4. c. 57., was to give the debtor a complete discharge from all his embarrassments, which object would be defeated if, notwithstanding a discharge from the claim of a principal creditor, he should afterwards be liable at the suit of a surety to such creditor. The insolvent is not to take the benefit of the act a second time within five years, except in certain cases, of which a suit at the instance of a surety is not one; if, therefore, this action lies, the Defendant may, for five years, be deprived of the benefit of the act. By section 60. he is to be released from arrest for any debt or *sum* or *sums of money* due before his discharge; and the words *sum* or *sums of money* seem to have been intended to apply to such a demand as the present. So by s. 51. he is to include in his schedule sums payable by way of annuity or *otherwise*. In *Wilmer v. White* (a) the Court did not decide this question, but merely refused to interfere summarily on motion.

(a) 6 Bingh. 291.

Heath Serjt. was on the same side.

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POWELL
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TINDAL C. J. I think the verdict for the Plaintiff ought to stand. The question arises on the construction of the insolvent [debtors' act, and we are to take the description of the debts from which the insolvent is to be discharged from the tenth and forty-sixth sections of the act. The tenth, which authorizes the insolvent's petition, describes them as "the demands of all persons who shall claim to be creditors of such prisoner at the time of presenting such petition."

And s. 46. authorizes his discharge from custody "as to the several debts and sums of money due or claimed to be due at the time of filing such prisoner's petition."

Then, was the Plaintiff a creditor of the Defendant at the time of presenting his petition? There was no debt as between him and the Defendant; the debt was due from the Defendant to *Bell*, the Plaintiff was no more than a surety, and consequently no creditor at the time of the discharge. As a confirmation of this view of the subject, we find that in an act passed the year before, the bankrupt act 6 G. 4. c. 16., a machinery is employed to relieve the bankrupt from the claim of a surety, for he may pay the debt and stand in the place of the original creditor. There is no such clause in the present act, from which we may infer that the legislature intended to discharge a bankrupt from such claims, but not an insolvent.

GASELEE J. I am of the same opinion. There is no possibility for a surety to claim under the insolvent debtors' act, except by paying the debt before the insolvent's discharge.

BOSANQUET J. The Plaintiff is entitled to retain his verdict: the debt for which he sues, became due subsequently

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sequently to the discharge of the insolvent, and there are no words in the act which relieve the insolvent from such a claim. The relief is confined to debts due at the time of the discharge. As to debts to become due by bond, annuity, or *otherwise*, the fifty-first section, which applies to them, cannot include a debt like this, for it says the Court shall ascertain their value, "regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition."

ALDERSON J. The fifty-first section was meant to benefit annuity creditors, by enabling them to claim for the whole amount, instead of the mere arrears due at the time of the discharge.

Rule discharged.

Nov. 12.

THORNE v. Marquess of LONDONDERRY.

Defendant, upon certain terms favourable to Plaintiff, was allowed to have a special jury after the cause had stood for trial by a common jury during a whole sitting, and had been twice postponed at the instance of the Defendant.

THIS cause, an action for an assault on a female servant, was entered for trial by a common jury at the sittings after last *Trinity* term; it was twice called on late in the day, and as often postponed on the representation of the Defendant's counsel, that it would occupy a long time. The cause having been made a remanet to this term, the Defendant now obtained a rule for a special jury; which rule

Wilde Serjt. moved to discharge, on the authority of the rule of Court, which requires that the rule for a special

special jury be served two days before the adjournment day after each term (a). The application should have been made before the adjournment day of the last sittings.

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 THORNE
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Jones Serjt., on the part of the Defendant, offered judgment of the term, the production of certain witnesses, and other facilities to the Plaintiff, as the condition of retaining the special jury.

These terms were not acceded to; but

The Court allowed the Defendant to retain his special jury upon condition of his fixing the cause for trial on a certain day, giving judgment of the term, and bringing up certain witnesses required by the Plaintiff.

Rule to set aside the rule for a special jury discharged.

(a) *R. T. 52 G. 3. 4 Taunt. 600.*

Mayor and Corporation of NORWICH v. GILL. Nov. 16.

THE sheriffs and coroners of *Norwich* being members of the corporation, Practice. Elisors.

Taddy Serjt. moved that the Court would enjoin the prothonotary to approve or appoint elisors to whom process should be directed; the prothonotary thinking he could not do so without an order from the Court.

The Court acceded to the application, and made the rule absolute in the first instance.

Rule absolute.

1891.

Nov. 16.

SCRUTON v. DAWSON.

Practice.
Venue.

JONES Serjt., upon the usual affidavit, moved to change the venue from *London* to the city of *Norwich*, unless the Plaintiff would consent to try in the county of *Norfolk*; but

The Court refused to accede to the application, except on an affidavit disclosing special grounds for it, and *Jones*

Took nothing. (a)

(a) See *Walton v. Hutton*, 15 *Petersdorff's Ab. tit. Venue*, 1 *Cbitty's Rep.* 14., and 1 *Tidd's* in not. *Pr.* 655. (8th ed.) in not. Also

Nov. 16.

WILLIAMS v. LEWSEY.

As against an execution creditor, a landlord is entitled to a full year's rent, although he has been used to remit some portion of it to his tenant.

EXECUTION being issued in this cause against the Defendant's goods, the sheriff, before the goods were sold, received notice from the Defendant's landlord to retain 450*l.* for a year's rent.

The sheriff, under an indemnity, refused to retain more than 360*l.*, on the ground that the landlord had abated his rent to that amount.

On a motion calling on the sheriff to pay over the 450*l.* to the Defendant's landlord out of the proceeds of the Defendant's goods, the landlord deposed, that though on account of hard times he had made a voluntary reduction in the Defendant's rent, yet he always considered himself entitled to demand the full amount, and

and gave his half-year's receipt for "180*l.* in satisfaction of 225*l.*," whereupon,

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 }
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 LEWSEY.

TINDAL C. J. said it was a very clear case. The landlord was not bound to make an abatement to the tenant's creditors, because he had chosen to make an abatement to the tenant.

Rule absolute.

Wilde Serjt. for the landlord; *Andrews* Serjt. for the sheriff.

BRIDGES, Widow, v. SMYTH, Spinster.

Nov. 16.

Same v. Same.

MRS. BRIDGES had judgment in this Court in the above two actions to the amount of 816*l.* 15*s.*, and she dying after the judgments were entered up, *Frowd*, her attorney, who claimed to be a judgment-creditor, had taken out letters of administration. Miss *Smyth* had a judgment in the Court of King's Bench to the amount of 3052*l.* against Mrs. *Bridges*, and *Frowd* was requested to set off the 816*l.* 15*s.* against the 3052*l.* This he refused to do: whereupon,

Held, that a judgment for Plaintiff in this Court might be set off against a judgment for Defendant in K.B., although Plaintiff was dead, and the judgment was assets in the hands of her administrator: Held, that the judgment in K. B. for Defendant was valid, although not entered up within two

Wilde Serjt. obtained a rule *nisi* for Miss *Smyth* to enter satisfaction on the judgment rolls in this Court, upon acknowledging satisfaction for 816*l.* 15*s.* on the judgment for 3052*l.* in the Court of King's Bench, and for *Frowd* to pay the costs of the application.

terms after death of Defendant, verdict having been given during her life, and the delay occasioned by a motion touching an award.

Storks

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 BRIDGES
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Storks and Russell Serjts. shewed cause, and objected, first, that the judgment in the Court of King's Bench was invalid; Mrs. *Bridges* having died after verdict, and judgment not having been signed within two terms after her death, as it ought to have been pursuant to 17 Car. 2. c. 8.

Secondly, That execution had been executed by Mrs. *Bridges*, she having issued a writ of *elegit*, and having commenced actions of ejectment to enforce it.

Thirdly, That Mrs. *Bridges* being dead, and *Frowd* being her administrator, the judgments in this Court were in a different right, and could not be set off without compromising the interests of creditors; and

That *Frowd* had a lien for his costs upon the judgments in this Court.

Wilde, in answer to the first objection, stated, that the verdict in the King's Bench had been obtained before the death of Mrs. *Bridges*, and was taken subject to the award of an arbitrator as to the amount, which award was also made before the death of Mrs. *Bridges*; but that she obtained a rule *nisi* to set aside the award, against which rule, owing to the pressure of business in the Court, cause could not be shewn within two terms after the death of Mrs. *Bridges*.

In answer to the second, he stated that the actions of ejectment had not been proceeded with, and cited *Simpson v. Hanley* (a), where the defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him, on his acknowledging satisfaction for the amount upon a judgment obtained by him in C. P. against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment; and *Lomas v. Mellor* (b) to the same effect.

(a) 1 M. & S. 696.

(b) 5 B. M. 95.

In answer to the third objection, he cited *Barker, Administratrix, v. Braham* (a), where a judgment in B. R. was ordered to be set off against a judgment in C. B., and the balance due to the plaintiff to be paid by the defendant in C. B.; the balance being all that the creditors could claim.

As to the attorney's lien, in this Court it did not interfere with a set-off of judgments.

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TINDAL C. J. We think this rule ought to be made absolute. *Mrs. Bridges* obtained judgment against *Miss Smyth* in two actions in this Court, amounting together to 816*l.* 15*s.*, and died after the judgments had been entered up in this Court, but two terms before judgment had been entered up against her by *Miss Smyth* in the Court of King's Bench. *Frowd*, her attorney, took out administration to the effects of *Mrs. Bridges*, claiming to be a judgment creditor; and the question is, Whether the judgments entered up in this Court for *Mrs. Bridges* are properly the subject of set-off against the judgment obtained by *Miss Smyth* in the Court of King's Bench? Three objections have been made to the set-off. It has not been urged that the judgments of one Court cannot be set off against the judgments of another; but it is said that the judgment in the Court of King's Bench, if not void, is at least irregular, because it was not signed within two terms after the death of *Mrs. Bridges*. The rule, however, established by the statute 17 *Car.* 2. does not apply to such a case as this. The verdict was obtained in the lifetime of *Mrs. Bridges*: the amount of damages was referred to an arbitrator, who also made his award in her lifetime; but an application was made on her part to reduce the amount of damages, and the rule was pending during the time

(a) 3 *Wils.* 396.

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necessary for deciding other causes which had priority. Pending the rule Mrs. *Bridges* died. The case, therefore, does not depend on the statute of *Car. 2.*, but on the rule of common law, that where parties are hung up by act of law neither of them loses his right, but eventually judgment is entered *nunc pro tunc*, as if the party were still alive. And while the judgment is suffered to exist on the rolls of the Court without any steps to set it aside, we can only treat it as a valid judgment.

The second objection is, that Mrs. *Bridges*, one of the parties, has prosecuted her judgment to execution; that she has advanced a step further than the other, and ought not now to be stopped. In reality she has obtained no advantage, because nothing has been done on the ejectments; and endeavouring to obtain satisfaction is no answer to an application like this unless complete satisfaction be obtained. That appears from *Simpson v. Handley*, where the defendant was allowed to set off a judgment against a judgment of the plaintiff's, although he had the plaintiff in execution.

The third objection is, that this is not a case between two parties, each in his own right; not a case of simple plaintiff and defendant; but the plaintiff in one suit being dead, the rights of others, that is, the rights of creditors to assets, intervene. The objection turns on a fallacy. For what are the assets? Suppose a simple contract debt of 50*l.* on one side, and of 40*l.* on the other, the assets would be 10*l.* The circumstance that the debts are judgment debts makes no difference: the actual balance forms the assets. In *Barker, Administratrix, v. Braham* a judgment in B. R. was ordered to be set off against a judgment in C. B., and the balance due to the plaintiff to be paid by the defendant in C. B.

As to the attorney's lien, it is well known that in this Court we do not regard it when we look at the rights
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of the parties. An officer of the Court was bound to know the rule in that respect, and therefore Mrs. Bridges's attorney having refused to allow the set-off, must pay the costs of this application.

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GASELEE J. The only difficulty I felt was as to the attorney's being administrator. That doubt is removed by *Barker v. Braham*; and we cannot upon affidavit enquire into alleged defects in a judgment of the Court of King's Bench. I have some doubt about the costs, but not enough to induce me to differ from the rest of the Court.

BOSANQUET J. I concur as to the set-off; and as to the costs, I think they ought to be paid by the attorney, because, being an officer of the Court, he was bound to know the rule, and not to drive the other party to make this application.

ALDERSON J. concurred.

Rule absolute.

CORBETT and Another v. BROWN.

Nov. 15.

THE declaration stated, that the Plaintiffs, before and at the times of the committing the grievances by the Defendant as thereafter mentioned, had been, and still were, warehousemen, and the trade and goods on credit, enquired of the Defendant, by letter, whether his son had, as he asserted, 300*l.* of his own property: Defendant answered that he had; the fact being that Defendant had lent his son 300*l.* on his promissory note, payable with interest on demand, and had received interest on the note.

The son having afterwards become insolvent, Held, that this was a misrepresentation for which the Defendant was liable in damages to the Plaintiffs, and a jury having found for Defendant, the Court granted a new trial.

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business of warehousemen for and during all that time had used exercised and carried on, and still did use, exercise, and carry on, at, &c.; that the Plaintiffs, so being warehousemen, and so using, exercising, and carrying on the said trade and business, one *Henry Brown*, before the committing of the grievance by the Defendant thereafter next mentioned, on the 15th of *April* 1830, at, &c. applied to the Plaintiffs, and then and there stated, that he was about to commence business at *Norwich*, and that he had 300*l.* capital, his own property, to commence business with, at, &c., and then and there requested the Plaintiffs to sell goods to him *Henry Brown* in the way of the Plaintiffs' trade and business of warehousemen, and then and there referred the Plaintiffs to the Defendant to corroborate the statement of him, *Henry Brown*, that he had capital 300*l.* of his own property, to commence business with at, &c., whereof the Defendant afterwards, and before the sale of the goods by the Plaintiffs to the said *Henry Brown* thereafter next mentioned, on, &c. at, &c. had notice, and was then and there requested by the Plaintiffs to inform them if the said *Henry Brown* had 300*l.* capital, his own property, to commence business with at, &c.; nevertheless the defendant, well knowing the premises, and that *Henry Brown* had not 300*l.* capital, his own property, to commence business with, at, &c., but fraudulently intending craftily and subtilly to deceive and injure the Plaintiff in that behalf, to wit, on, &c. at, &c., falsely, fraudulently, and deceitfully informed the Plaintiffs, in answer to their enquiry, that the statement so made to them by *Henry Brown* as to the 300*l.* was perfectly correct, as the Defendant had advanced him, *Henry Brown*, the money; by means and in consequence of which information so given by the Defendant to the Plaintiffs as aforesaid, they, not knowing to the contrary, but believing therefrom that *Henry Brown*

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Brown had 300*l.* capital, his own property, to commence business with, at, &c., afterwards, to wit, on, &c. and on divers other days and times to wit, at, &c. were induced to give credit to *Henry Brown*, and did then and there sell and deliver to him divers goods on credit, at or for divers prices, in the whole amounting to a certain large sum of money, to wit, the sum of 700*l.*; whereas in truth and in fact the said *Henry Brown*, at the time of the Defendant so giving the information to the Plaintiffs as aforesaid, had not 300*l.* capital, his own property, to commence business with, at, &c., and the Defendant, at the time of his so giving the information to the Plaintiffs, well knew the same; and whereas in truth and in fact the Defendant, at the time of his so giving the information to the Plaintiffs, had not advanced the said sum of 300*l.*, or any sum whatever, to *Henry Brown*. Averment, that *Henry Brown* now is in bad and insolvent circumstances, and that the sum of 700*l.* is wholly due and unpaid to the Plaintiffs, and that they are likely to lose the same.

Plea, not guilty, and issue thereon.

At the trial before *Tindal C. J.*, *London* sittings after last term, it appeared that *H. Brown*, being about to open a shop at *Norwich*, applied to the Plaintiffs for a supply of goods upon credit; and upon enquiry as to his circumstances, he stated he had a capital of 300*l.* to begin with. The Plaintiffs were particular in their enquiries, and *H. Brown* referred to his father (the Defendant) to corroborate the truth of his statement; whereupon the following correspondence took place between the Plaintiffs and the Defendant:—

“Your son, Mr. *Henry Brown*, has purchased goods of us, and referred us to you in order to corroborate his statement of having 300*l.* capital, his own property, to commence business with at *Norwich*. We require to

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know if such be the case. Any further information you may please to give will oblige us, and which we shall be happy to apply in promoting your son's object, provided we can consistently do so. We shall be glad of an answer by return of post; and are, &c.

CORBETT, SIMES, and Co."

"In reply to your letter of yesterday, I beg to acquaint you that the statement made to you by my son *Henry* as to the 300*l.* is perfectly correct, as I advanced him the money, being the utmost I could spare at the present time, in consequence of having a numerous family.

"I hope my son's dealings with you will be at all times as correct as the present statement; and am, &c.

JAMES BROWN."

In consequence of the Defendant's letter, the Plaintiffs trusted *H. Brown* from time to time to a large amount, and he soon became bankrupt in their debt, paid a dividend of 8*s.* 6*d.* in the pound, and left the Plaintiffs losers of the sum of 389*l.* 10*s.* 7*d.* The 300*l.* Defendant had lent to *H. Brown* about three weeks before his letter to the Plaintiffs, the Defendant taking, at the time of the loan, *H. Brown's* promissory note for the amount, payable on demand, with interest at 5 per cent., which interest was paid up to the time of *H. Brown's* bankruptcy; but the Defendant declined to prove the 300*l.* as a debt under his son's commission. The jury found for the Defendant; whereupon,

Wilde Serjt. obtained a rule *nisi* to set aside this verdict as contrary to the evidence, the Plaintiffs having requested to know whether the Defendant's son had 300*l.* capital, of his own property, and the Defendant having stated such to be the fact, when he knew his son had none but borrowed capital.

Jones

Jones Serjt., who shewed cause, contended that the Defendant was warranted in the answer he had given, money lent by a parent being commonly intended as a gift; as it turned out in this case, the father having forborne to prove for his debt under the son's bankruptcy. Besides which, money borrowed, when once in the son's disposition, was as much his own property, and as applicable to mercantile purposes, as money realized by himself.

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TINDAL C. J. We think there ought to be a new trial in this case on payment of costs; the jury having drawn a conclusion from the Defendant's letter, which, it seems to the Court, its contents do not warrant.

GASELEE J. concurred.

BOSANQUET J. A party who sets up in business on borrowed capital is in very different position in point of credit from a party who sets up unembarrassed with debt.

ALDERSON J. The question is, whether, from the statement's being false within the Defendant's knowledge, the Court must not infer fraud.

Rule absolute.

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KENNETT v. MILBANK.

Defendant, by a deed reciting that he was indebted to Plaintiff and others, assigned his property to Plaintiff, in trust to pay all such creditors as should sign the schedule of debts annexed; provided that if all did not sign, the deed should be void. Plaintiff never signed, nor was the amount of his debt stated:

Held, not a sufficient acknowledgment to take Plaintiff's debt out of the statute of limitations, although it was admitted orally that he had but one debt.

THIS was an action on a promissory note, to which the Defendant pleaded the statute of limitations.

To take the case out of the statute, the Plaintiff put in a deed of 13th of *March* 1829, between the Defendant of the one part, and the Plaintiff and one *Cooper* of the other; by which, after reciting that the Defendant was indebted to the Plaintiff and others, the Defendant assigned a freehold estate and all his property to the Plaintiff and *Cooper*, in trust to sell the same, and pay such creditors as should sign their names to the schedule of debts annexed, if the Defendant should have omitted to pay 6s. 8d. in the pound by the 20th of *December* then next; with a proviso that if all the creditors, whose debts amounted to 10*l.*, did not sign by the 13th of *August* then next, the deed and all the covenants should be void.

The Plaintiff never executed the deed, and the amount of his debt was no where stated; but it was admitted by counsel at the trial, that the promissory note sued on was the only debt due.

It was objected, that the recital in the deed was not a sufficient acknowledgment of the specific debt to take it out of the statute of limitations; and the verdict was taken for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a nonsuit instead.

Andrews Serjt. having obtained a rule *nisi* accordingly,

Wilde Serjt. shewed cause. The recital in the deed is a sufficient acknowledgment in writing to satisfy the statute

statute 9 G. 4. c. 14. It is stated in the deed, without qualification, that the Defendant was indebted to the Plaintiff; and it was admitted at the trial, that there was no other debt besides the promissory note. Before the statute 9 G. 4., a promise to pay was implied from an unqualified admission of debt. *Tanner v. Smart* (a), *Haydon v. Williams* (b), *Gibbons v. M'Casland* (c), *Mountstephen v. Brook*. (d) The statute has merely required that the acknowledgment shall be in writing; for if it did not give the same effect to the acknowledgment when once established by writing, as was given before to a parol acknowledgment, it would be worse than nugatory. It may be collected, however, from the language of the statute itself, that an unqualified acknowledgment in writing was to have the same effect as before; for, after reciting that questions had existed as to the effect of acknowledgments and promises, it enacts, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment, or promise *by words only*, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

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TINDAL C. J. The rule for entering a nonsuit in this case ought to be made absolute. The question is, whether the debt which the Plaintiff seeks to recover has been taken out of the operation of the statute of limitations by any evidence adduced at the trial. Independently of the statute 9 G. 4. c. 14. I should have had

(a) 6 B. & C. 603.
 (b) 7 Bingh. 163.

(c) 1 B. & A. 690.
 (d) 3 B. & A. 141.

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no doubt. But by that statute it is enacted, "that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." The question, therefore, is, whether we have any evidence in writing of an acknowledgment or promise with respect to this debt. Evidence of promise there is none. A deed was put in, by which the Defendant, after reciting that he was indebted to the Plaintiff and others, assigned his property to the Plaintiff and *Cooper* in trust to sell the same and pay the creditors who should sign their name to the schedule of debts annexed, in case the Defendant should have omitted to pay 6s. 8d. in the pound by a given day; with a proviso that the deed and all the covenants in it should be void, unless all the creditors whose debts amounted to 10*l.* signed within a certain time. The deed was never executed by the Plaintiff, nor does it even specify the amount of his debt. It cannot, therefore, be considered evidence of a promise; and the less so, as it became void for want of execution by the creditors within the stipulated time. Is it, then, evidence of an acknowledgment? By the 9 *G. 4.*, which was passed to put an end to doubts which had arisen on the statute 21 *Jac. 1.*, it is required that the whole of the acknowledgment shall be in writing. The deed in question is made in trust for those creditors who shall come in and sign the schedule; but the Plaintiff's name is not there; and the acknowledgment ought to go to amount as well as to credit, otherwise the Plaintiff might claim one thousand pounds as easily as one. It has been contended, indeed, that

that this part of the acknowledgment has been supplied by the admission of counsel in Court; but that is not sufficient where the statute requires the acknowledgment to be in writing, and the only object of the admission is to save the time of the Court. Suppose, before the statute of 9 G. 4., the statute of limitations had been pleaded, and the counsel for the Defendant had admitted his handwriting, would that alone have taken the case out of the statute? If not at a time when the whole of the admission might be by parol, why should it have that effect when the whole of the acknowledgment is required to be in writing? The recent statute was intended to protect parties against demands made after an unreasonable time, and no injustice is done in giving it full effect.

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GASELEE J. I am of the same opinion. The deed recites that the Defendant was indebted to the parties in the sums set opposite to their names; but no sum is mentioned as the Plaintiff's debt, and, therefore, there is no evidence of any acknowledgment in writing. There is also another point in this case on which a difficulty arises: an acknowledgment before the time limited by statute has elapsed, has been held evidence from which a promise to pay may be inferred; but it is not clear that such an inference would be drawn where the acknowledgment is after the six years; and if there be any promise in this case, it is qualified with the condition that it should be void unless all the creditors whose debts amounted to 10*l.* should sign the deed within a given time. The admission by counsel was made without prejudice, and cannot be taken into account.

BOSANQUET J. The late statute requires that the whole of the acknowledgment shall be in writing. The
 acknow-

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acknowledgment here is only in general terms, that the Defendant is indebted in the sums set opposite to the names of the parties, but no sum is specified as the amount of the Plaintiff's claim; therefore, without the additional evidence in writing of that sum, there is no such acknowledgment as the statute requires.

An acknowledgment, however, can only operate as evidence of a promise; and if it be accompanied with qualifications which shew it was not meant to operate as a promise, it will not be sufficient to take a debt out of the operation of the statute of limitations. The evidence here is a deed, which concludes with a proviso that unless all the creditors of a certain class come in and sign within a given time, the deed and the covenants contained in it shall be void. The acknowledgment was part of the deed, and has become void for want of the condition required to give it validity.

ALDERSON J. The enactment which requires the acknowledgment of a debt to be in writing, must apply to the debt for which the Plaintiff is suing. The acknowledgment here is only of some debt; but of what, remains to be made out by parol evidence. To admit such evidence under these circumstances, would defeat the whole object of the recent statute. It might lead to conflicting testimony, and produce all the inconvenience which that statute was designed to obviate.

Rule absolute.

1831.

YOUNG, Assignee of YOUNG, a Bankrupt, v. *Nov. 19.*
MARSHALL and POLAND, Sheriff of Middlesex.

THIS was an action for money had and received, brought by the Plaintiff, as assignee of *Young*, a bankrupt, to recover the proceeds of certain goods of the bankrupt sold by the Defendants as sheriff of *Middlesex*, under a writ of *feri facias*; the commission of bankrupt having been issued against *Young* on an act of bankruptcy anterior to the writ of *fi. fa.*

The Defendants had no notice of the bankruptcy until after the levy, when they paid the proceeds over to the execution creditor under an indemnity.

A verdict having been found for the Plaintiff,

Taddy Serjt. obtained a rule *nisi* to set it aside, on the ground that the action was misconceived, and ought to have been *trover*; contending that the action for money had and received did not lie, at least against a public officer, where the money had been paid over and the property changed.

Wilde Serjt., who shewed cause, was proceeding to urge, that the sheriff, having paid over under an indemnity, stood in the same situation as the party indemnifying, when the Court called on

The sheriff sold goods under a *fi. fa.*, without notice of a previous act of bankruptcy by the Defendant, and paid over the proceeds of the sale to the Plaintiff upon an indemnity: Held, that the Defendant's assignee might properly sue the sheriff in an action for money had and received.

Taddy to support his rule. By the sale under the execution, the property in the goods was changed, and ceased to be the property of the bankrupt or his assignee.

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assignee. *Perkinson v. Gilford*(a), *Clerk v. Withers*(b), *Moreland v. Pellatt*, per Bayley J. (c) Although, therefore, the assignee might sue the sheriff in trover for improperly detaining goods to which the assignee was entitled, *Price v. Helyar*(d), he could not sue him in *assumpsit* for proceeds arising from the goods after the property in them had been changed by a *venditioni exponas* under the *fi. fa.* Besides, by suing in form *ex contractu*, he treats the sheriff as his agent, and affirms all his previous acts. After affirming the sale, therefore, the Plaintiff cannot claim the proceeds on the ground that the sale was not warranted. At all events, the action is too late after the sheriff has paid the money over in obedience to a writ. *Thurston v. Mills*. (e) The sheriff, as a public officer, ought to be protected where he acts without notice.

TINDAL C. J. The verdict for the Plaintiff in this case may be supported on a principle generally known and acknowledged in *Westminster Hall*. This is an action by the assignee of a bankrupt against the sheriff of *Middlesex*, on the ground that he has sold, under a *fi. fa.*, goods belonging to the Plaintiff, and which he ought not to have taken. But no party is bound to sue in *tort*, where, by converting the action into an action of contract, he does not prejudice the defendant; and, generally speaking, it is more favourable to the defendant that he should be sued in contract, because that form of action lets in a set-off, and enables him to pay money into Court. It has been contended, however, that the action does not lie here, because the Defendant has paid the money over to a judgment creditor without

(a) *Cro. Car.* 539.

(b) *Ld. Raymd.* 1073, per Gould J.

(c) 8 *B. & C.* 723.

(d) 4 *Bingh.* 597.

(e) 16 *East*, 267.

notice of the act of bankruptcy. If that were so, I should agree that the money was no longer in the Defendant's hands to the use of the Plaintiff: but money paid over on an indemnity, may be said not to have been paid over at all: the Defendant, however, paid after notice, for he paid upon an indemnity, and that could only have been exacted on knowledge of the facts. The case, therefore, falls within the general rule, that a party is not bound to sue in *tort*, where, by suing in contract, he produces no injury to the Defendant.

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PARK J. The indemnity is of itself strong evidence of notice before the payment.

BOSANQUET J. By relation to the act of bankruptcy, the property was in the Plaintiff at the time of sale. The Plaintiff, who sues in an action for money had and received, does not thereby affirm the acts of the sheriff, he merely waives his claim to damages for a wrong, and seeks to recover only the proceeds of the sale. It is true the sheriff is a public officer, but if he pays over upon an indemnity, he pays with notice, and the Plaintiff, who is entitled, must recover.

ALDERSON J. If ever the question should arise, whether the sheriff is liable when he has sold and paid over without notice of the act of bankruptcy, the Court will determine it; but no such question arises here, because the indemnity is virtually notice. It has been urged, that the property is changed by sale; and so it is as between a purchaser and the party against whom execution has issued, but not as against a party whose goods have been wrongfully taken. By proceeding by the action for money had and received, the party merely waives his claim to damages for the seizure and detention of the goods, and is content to sue for the proceeds.

Rule discharged.

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DOE v. WHITCOMB.

The judgment in the preceding ejectment is evidence in an action for mesne profits against a defendant who came into possession under the defendant in the ejectment.

TRESPASS for mesne profits. At the trial before *Alderson J.*, last *Somerset* assizes, the evidence was, Judgment in ejectment against *Simon Payne* in *Hilary* term 1823, upon a demise for twenty-one years, commencing in 1822;

A *scire facias* upon this judgment in *Trinity* 1830, and notice thereof to the Defendant and others;

Execution, by *habere facias possessionem*.

It was then proved that the Defendant had occupied the premises for a year ending *November* 1830; that he had been let into possession under an agreement made by the son of *Simon Payne* on behalf of his father, and had paid rent to the son.

It was objected, that this evidence did not connect the Defendant with *Simon Payne* sufficiently to render him liable to this action for mesne profits, and the verdict was taken for the Plaintiff, with leave for the Defendant to move the Court on the point: accordingly,

Stephen Serjt. having obtained a rule *nisi* to set aside the verdict,

Wilde Serjt. shewed cause, and contended, that the Defendant, having come in under *S. Payne*, held the premises under the same liabilities. If the law were otherwise, the Defendant in ejectment might always deprive his landlord of the mesne profits, by delivering up possession to a stranger.

Stephen. The judgment in ejectment was no evidence against the Defendant *Whitcomb*. A judgment is evidence

dence only against parties and privies; *Outram v. Morewood*. (a) *Whitcomb* was not a party. And privies are only of two kinds; privies in estate, and privies by act of law in the *post*: *Co. Lit.* 352. a. He was not a privy by act of law, and he could not be privy in estate; for *Simon Payne* was a trespasser, and had no estate. *Whitcomb*, therefore, though liable to be put out of possession, is not, by this evidence, so connected with *S. Payne* as to be liable for the mesne profits. In *Denn v. White* (b) it was held, that a recovery in ejectment against the wife could not be given in evidence in an action against the husband and wife for mesne profits.

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TINDAL C. J. We entertain no doubt on the case. The evidence was, a judgment in ejectment against *Simon Payne*; the execution of a writ of possession thereon; that the defendant came in under *Simon Payne*; had possession for a certain time, and paid rent to a certain amount. The only objection to the verdict is, that the defendant is a stranger to the record in ejectment against *Payne*. The answer is, that the Defendant came in under *Payne* while the judgment in ejectment was pending, and that he cannot hold by a better title than *Payne*. As he came in under *Payne*, the judgment is evidence against him.

Rule discharged.

(a) 3 *East*, 345.

(b) 7 *T. R.* 112.

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Nov. 14.

BUDD v. FAIRMANER.

"Received of B. 10*l.* for a grey four year old colt, warranted sound:"

Held, that the warranty was confined to soundness, and that, without proving fraud, it was no ground of action that the colt was only three years old.

THE Plaintiff sued on an alleged breach of warranty in the sale of a horse.

The proof of the warranty consisted of the following receipt, which was drawn up by the Plaintiff's servant, and signed by the Defendant.

"Received of Mr. *Budd* 10*l.* for a grey four year old colt, warranted sound in every respect."

The complaint was, that the colt, which the Plaintiff had purchased to match another in his possession, was only three years old; as to which, the evidence seemed somewhat conflicting; but the Chief Justice, before whom the cause was tried, thinking the warranty applied to soundness only, and that the age was a mere matter of description, the Plaintiff was nonsuited.

Wilde Serjt. moved to set aside the nonsuit, on the ground that the Defendant's warranty included the age as well as the soundness of the animal. By the very act of sale, the vendor warrants that the article is such as he professes to sell, and the purchaser proposes to buy. Thus, in *Gardiner v. Gray* (a), where the defendant undertook to sell the plaintiff *waste silk*, and sent an article not saleable under that denomination, Lord *Ellenborough* said, "The intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them: the purchaser cannot be supposed to buy goods to lay them on a dunghill." In *Bridge v. Wain* (b), it was held, that where goods sold were de-

(a) 4 *Campb.* 144.(b) 1 *Stark.* 504.

scribed in the invoice as *scarlet cuttings*, a warranty was to be inferred that the goods answered the known mercantile description of scarlet cuttings. So in *Yates v. Pym (a)*, where the defendant sold what he described as prime singed bacon, he was not allowed to shew a custom in the trade to receive bacon to a certain degree tainted, as prime singed bacon; and the bacon in question being tainted, the plaintiff retained his verdict. Here, the purchaser proposed to buy a four year old horse for the purpose of matching another: a three year old colt was unfit for such a purpose, or even for general employment. The seller professed to sell a four year old; and having altogether failed, he is liable in damages for his breach of contract: for the particular warranty as to soundness does not supersede the general warranty that the thing sold is what the vendor professes to sell. Lord *Coke* says, "If a man make a feoffment by *dedi*, and in the deed doth warrant the land against *J. S.* and his heirs, yet *dedi* is a general warranty during the life of the feoffor." (b) And in policies of insurance, a particular warranty does not narrow any general or implied warranty; as that the ship is seaworthy, or the like. If the Defendant had sold a gelding or a stallion warranted sound, would it have been a performance of his contract to have delivered a mare?

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The Court granted a rule *nisi*, against which

Andrews and *Russell* Serjts. shewed cause.

The instrument produced is a mere receipt, and must be construed according to the intention which appears on the face of it. From the position of the word *warranted*, it is plain that soundness was all that

(a) 6 Taunt. 446.

(b) Co. Lit. 384. a.

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the Defendant proposed to warrant, and that age was mere matter of description ; if it had been proposed to warrant age as well as soundness, the instrument should have run "warranted four years old, and sound." The cases relied on are not cases of warranty, but of general contract ; and doubtless a vendor must deliver an article, answering, in all material points, the description of the article he professes to sell. But a horse, unexceptionable in other respects, does not materially vary from the description given of him if he turn out to be three years old instead of four, more especially as the difference between the two ages is perceptible by inspection of the mouth, which excludes the probability of any intentional misrepresentation. In *Dunlop v. Waugh* (a), it was held that what the vendor says about the age of an animal, is not a warranty of the age, for it may be a mere statement of his belief. In *Richardson v. Brown* (b) the defendant's advertisement was, "To be sold, a black gelding five years old ; has been constantly driven in the plough ; warranted ;" and it was holden that the warranty applied to soundness only. So, in *Dickenson v. Gapp* (tried before Dallas C. J., *Middlesex* sittings 1821), the plaintiff sued for a breach of warranty, in proof of which he adduced the following receipt : — "Received of Mr. *Dickenson* 100*l.* for a bay gelding, got by *Cheshire Cheese* ; warranted sound ;" and then shewed that the horse was not got by *Cheshire Cheese*. Dallas C. J. held, that the warranty was confined to soundness, and nonsuited the plaintiff, who never moved to set aside that decision. So in *Jeudwine v. Slade* (c) it was held, that putting down the name of an artist in a catalogue as the painter of a picture, is not such a warranty as will subject the party selling to

(a) *Peake N. P. C.* 167.

(c) 2 *Esp.* 572.

(b) 1 *Bingb.* 344.

an action, if it turn out that he might be mistaken, and it was not the work of the artist to whom it was attributed. Upon a mistaken representation a party is not liable, unless he be guilty of fraud, but upon a warranty he is liable at all events. *Williamson v. Allison*(a). If the Defendant be held to have warranted the age, he may, with as much justice, be contended to have warranted the colour of the horse, or any other quality equally obvious to the sense.

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Wilde and Spankie Serjts. Richardson v. Brown was not an action on a warranty, but for the price of a horse which the defendant had kept and used; and the alleged warranty being apparently resorted to by an afterthought for the purpose of eluding payment, was not entitled to much favour. There is no printed report of *Dickenson v. Gapp*; and as to the age of the horse being apparent upon inspection, it does not appear but that the Plaintiff purchased without inspection on the recommendation of the Defendant. The principle which applies to such transactions is clearly laid down in *Shepherd v. Kain*(b), where the defendant sold what he described to be "a copper-fastened vessel; to be taken with all faults." The Court held, "with all faults must mean, all faults which it may have consistently with its being the thing described;" and that as the ship was not copper fastened, the plaintiff was entitled to recover for a breach of warranty.

TINDAL C. J. In this case a written instrument was produced by the Plaintiff to shew the nature of the contract between him and the Defendant, and we are to interpret that instrument like all others, according to the intention of the parties. The instrument appears

(a) 6 East, 446.

(b) 5 B. & A. 240.

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to be a receipt for 10/. "for a grey four year old colt, warranted sound." I should say that, upon the face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not: it is only necessary for the buyer to shew that the article is not according to the warranty: whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the *scienter*, and shew that the description was false within the knowledge of the seller. And where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable. Therefore, in *Parkinson v. Lee (a)*, upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect, unknown to him, but arising from the fraud of the grower from whom he purchased. A party who makes a simple representation stands, therefore, in a very different situation from a party who gives a warranty. And if so, how can I say that this distinction was not present to the mind of the Defendant in this case? When he sells a grey four year old colt, warranted sound, he means to say that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shewn to be false within his knowledge. Many cases have been referred to, and some stress has been laid on the effect of the word *dedi* when contained in a grant;

(a) 2 East, 313.

but,

but, according to Lord *Eldon*, in *Browning v. Wright* (a), words of that nature “import a contract in law, the effect and meaning of which would be affected by the subsequent words of the indenture;” and in the cases relied on for the Plaintiff, the sellers had delivered commodities essentially different from those which they had professed to sell. *Richardson v. Brown* and *Dickenson v. Gapp* are authorities in point for the Defendant.

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GASELEE J. concurred.

BOSANQUET J. In every case where the contract appears on a written instrument, the instrument must be construed according to the intent of the parties. As, where the dealing is by a contract note, the article delivered must agree with the terms of the note; or, where a ship is insured, it must correspond with the warranties contained in the policy. What is the instrument here? Not a contract of sale, but a mere receipt, describing an antecedent contract. Are we to infer from the terms used, that the party had expressly contracted the animal should be four years old? The collocation of the word *warranted* shews that such was not the intention of the parties. *Richardson v. Brown* proceeded on this principle, and *Dickinson v. Gapp* is almost the same case as the present. Interpreting this instrument, therefore, according to the intention of the parties, I think it clear that the warranty was confined to soundness.

ALDERSON J. It is not necessary to refer to *Richardson v. Brown*, because we can see here, from the collocation of the word *warranted*, that it is confined to the quality of soundness.

Rule discharged.

(a) 2 B. & P. 21.

1891.

Nov. 22.

WILSON v. HAMER.

A party discharged from arrest on giving security, cannot be arrested again if the security turn out to be worthless, unless he has been guilty of fraud.

THE Defendant had been discharged from an arrest, upon giving the Plaintiff securities, which, as the Plaintiff alleged, turned out to be of no value. The prothonotary, upon an investigation of the circumstances, found that there was no fraud; but the Plaintiff, when the nature of the securities was manifest, without restoring them, had arrested the Defendant a second time for the same cause.

Wilde Serjt. obtained a rule *nisi* for setting aside the process on the Defendant's filing common bail; when

Spankie Serjt., in support of the second arrest, relied on *Puckford v. Maxwell* (a), where the defendant having been arrested at the suit of the plaintiff, obtained his discharge by giving a draft for a part of the demand, which draft being dishonoured, a second arrest was held regular.

TINDAL C. J. The rule must be made absolute. The Defendant was discharged from the first arrest upon an arrangement that securities should be given. Whether they were adequate or not, at all events the Plaintiff took them, and now, without restoring them, arrests the Defendant a second time. The principle of the case referred to is, that when a party gets rid of an arrest by subterfuge or fraud, as by giving a check on a person with whom he has no connection, the plaintiff may arrest him again. That is not the case here, and, therefore, the rule must be made

Absolute.

(a) 6 T. R. 52.

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DIGBY v. Lord STIRLING.

Nov. 22.

SPANKIE Serjt. had obtained a rule *nisi* to set aside the *capias ad respondendum* and bail-bond in this case, upon an affidavit that the Defendant was a *Scotch* peer; had voted at elections for *Scotch* peers in the years 1825, 1830, 1831, when his vote was duly received by the clerk of session; and that an application similar to the present had been made to Lord *Tenterden* with success.

Defendant having voted at the election of *Scotch* peers, Held, as a *Scotch* peer, entitled to be discharged from arrest, although his vote had been protested against, his claim to the title disputed, and never recognised by the House of Lords or at Court.

Wilde Serjt. shewed cause on affidavits, which denied that the Defendant had any rightful claim to the title, or that the patent on which he relied, existed. It was also to be collected from the Defendant's own affidavit, that at the last election the Duke of *Buccleugh* and Lord *Lauderdale* had protested against the Defendant's voting; that his right had not been recognised by the House of Lords previous to voting, as required by order of that house; that the Lord Chancellor had refused to acknowledge him, and the King to receive him at court. The Defendant, therefore, it was contended, was not even a peer *de facto*; for the clerk of session had exercised no judgment on the claim, his office being merely ministerial.

TINDAL C. J. The course which the Court will pursue is that to which the Defendant is entitled at their hands. Without our coming to any decision on the particulars of the Defendant's claim, he is entitled to be discharged on common bail if he acts as a peer of *Scotland*. By the twenty-second article of the act of union (5 *Ann. c. 8.*), sixteen peers of *Scotland* are to sit and

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vote in the House of Lords; and by the twenty-third article, all peers of *Scotland* are to enjoy all privileges of peers as fully as peers of *England*, except the right and privilege of sitting in the House of Lords. By an act of the next year, 6 *Ann. c. 23.*, the mode of electing the sixteen peers is regulated. Proclamation is to be issued commanding all the peers of *Scotland* to assemble and meet at *Edinburgh* to elect, by open election, the sixteen peers; and we have only to see whether the Defendant did, in obedience to any such proclamation, meet at *Edinburgh* for the purpose of such election. It is not denied that he did so in 1825, 1830, and 1831. No objection was made till the last time, and he then voted in defiance of the protest of two of the peers; the protest, therefore, serves rather to strengthen than to impair his claim. However, on the validity of his title we give no opinion; but as he performed acts which *Scotch* peers are called on to perform, and which, since the Union, were the only acts which he could perform in the character of peer, he is entitled to the protection of these statutes. We cannot presume that any one would be allowed to vote who is not *de facto* a peer. This Court cannot judicially notice the order of the House of Lords that no one shall vote till his title has been recognised by that House. We think, therefore, that this rule must be made absolute; but as it has been obtained under circumstances of doubt, without costs.

Rule absolute accordingly.

1831.

BRADLEY v. RICARDO.

Nov. 23.

THIS was an action against the sheriff of *Gloucestershire* for a false return of *nulla bona* to a writ of *fi. fa.*

At the trial the Plaintiff called the sheriff's officer to prove the receipt of the warrant to levy.

Upon cross-examination, the witness affirmed that no goods could be found belonging to the party against whom the levy was directed.

The Plaintiff's counsel was then proceeding to prove his case by other witnesses, and to contradict the sheriff's officer as to his statement that no goods could be found, when the learned Judge who presided thought that, if the Plaintiff were permitted to contradict a witness placed in the box by himself, as to a particular fact, the whole evidence of the witness must be struck out; upon which the Plaintiff was nonsuited.

Where a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the Judge.

Wilde Serjt. obtained a rule *nisi* to set aside the nonsuit, contending that though a party is not allowed to throw general discredit on the character of a witness called by himself, he may set him right as to any particular fact which he may have stated incorrectly, and the rest of his evidence may stand.

Ludlow Serjt. shewed cause, and relied upon *Alexander v. Gibson* (a), where it was held that if a witness unexpectedly gave evidence against the party calling him, although his evidence could not be in part relied upon, and the rest of it disproved, it might be entirely repudiated, and witnesses might be called on the same side to contradict him. And Lord *Ellenborough* said, "The

(a) 2 *Campb.* 556.

party

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party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." The witness was not a witness of necessity, for the fact of the receipt of the warrant might have been proved by another.

TINDAL C. J. This rule must be made absolute. The object of all the laws of evidence is to bring the whole truth of a case before a jury; but if this rule were to be discharged, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labour under a defect of memory, or be otherwise unable to make a statement on which complete reliance could be placed. Suppose a case in which, for some formal proof, the plaintiff is obliged to make a witness of the defendant's attorney, who on cross-examination makes a statement adverse to the plaintiff; is the plaintiff to be precluded from calling the witnesses whom he had prepared before to shew the real state of the case? It has been urged as an objection, that this would be giving credit to the witness on one point after he has been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony. The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that when surprised by a statement contrary to fact, he may not call another

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another witness to shew how the fact really is. It is a common occurrence that persons called on to give their testimony decline to make any statement before they appear in Court. It would be a great hardship if the party compelled to call such persons should be bound by every thing they may choose to say. The alteration in the general rule which the Defendant in this case seeks to establish, would lead to great inconvenience and injustice. The rule, therefore, which has been obtained for setting aside the nonsuit must be made absolute.

GASELEE J. In *Alexander v. Gibson* Lord *Ellenborough* says, "The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." With deference to Lord *Ellenborough*, it seems to me that it is for the jury to say whether his evidence is to be entirely repudiated or not. It is going too far to determine that the party shall suffer because a witness is not consistent in his testimony. *Ewer v. Ambrose* (a) is in point.

BOSANQUET J. I think that this nonsuit ought to be set aside. The general rule is, that a party who calls a witness into the box is not permitted to prove generally that he is unworthy of credit, but may contradict him as to particular facts. It has been objected, however, that you cannot contradict him as to a particular fact without repudiating his evidence altogether. But the practice has always been the other way, and if there be any thing in *Alexander v. Gibson* in support of the

(a) 3 B. & C. 749.

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argument urged on the part of the Defendant, I cannot agree in that view of the subject: it is inconsistent with both principle and practice. A party is often compelled to call an adverse witness; and if he, on cross examination or otherwise, makes statements inconsistent with fact, another witness may be allowed to contradict him: and there is no instance of a judge having been called upon in such a case to strike out the rest of his evidence. The discrepancy may afford a fair topic for counsel as to the degree of credit to which the witness is entitled, but the whole statement must go to the jury, who, in forming their judgment, are often guided by the manner and feelings of the witness. If he states some facts which are adverse to the bias under which he speaks, and some which coincide with it, the jury may, without inconsistency, believe the one statement and reject the other.

ALDERSON J. I am of the same opinion, and adhere to the rule as laid down in *Buller's Nisi Prius*. A party will not be permitted to produce general evidence to discredit his own witness. That is the true rule, and I cannot but dissent from the restriction of it which has been ascribed to Lord *Ellenborough*. The case cited by him, *Lowe v. Jolliffe*, establishes the contrary of the proposition for which it was cited. There, all the attesting witnesses swore to the insanity of the testator when the will was executed, but they were contradicted by other evidence, and the will was established.


Now, in order to prove a will by an insane person, it must be proved, not only that the testator was insane but that the will was executed; and in that case, although the testimony was rejected as to the sanity, it was received as to the execution: that agrees with good sense and the general practice.

A party calls many witnesses; one of them states a fact adverse to his claim, another explains the statement:

ment: was it ever heard of that on such an occasion the whole testimony of the former witness should be struck out? A witness is called to prove a notice to produce a written instrument: upon cross examination he makes some incorrect statement: is the party who calls him and who controverts this statement to be precluded from giving a copy of the written instrument in evidence, because, as it has been argued, the testimony of the witness as to the notice is to be struck out? Such a rule would lead to the greatest inconvenience.

The rule as laid down by Mr. Justice *Buller* is intelligible and clear, namely, that a party shall not be permitted to throw general discredit on a witness whom he has put into the box; but it would be monstrous if the whole of his testimony were to be struck out because a subsequent witness sets him right as to a single fact which he may have stated incorrectly.

Rule absolute.

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HEWITT v. PIGOTT, Sheriff of SOMERSET.

Nov. 23.

HEWITT v. Lord EGMONT.

THE Plaintiff had a judgment for 2497*l.* 8*s.* 8*d.* in the above cause against Lord *Egmont*, whose property, by a deed of November 1824, had been conveyed to *C. F. Adey* and others in trust to sell and pay creditors.

The Plaintiff issued a *fi. fa.* on this judgment, to which *Pigott*, the sheriff of *Somersetshire*, indemnified attorney, to whom, with other trustees, *E.*'s property had been conveyed in trust, to pay creditors. A verdict having been given for the sheriff, in an action against him by Plaintiff for a false return, Plaintiff was not allowed to set off the costs in that action against the debt due on the judgment for 2497*l.*

Plaintiff had judgment against *E.* for 2497*l.*, and issued a writ of *fi. fa.*, to which the sheriff returned *nulla bona*, being indemnified by *E.*'s

by

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by *Adey* on the part of Lord *Egmont*'s trustees, returned *nulla bona*.

The Plaintiff, thereupon, sued *Pigott* the sheriff for a false return. *Adey* appeared as attorney for *Pigott*, in whose favour the verdict was ultimately found.

Cross Serjt., upon an affidavit of the foregoing facts, and that *Adey* had offered the Plaintiff 700*l.* and a debenture for a 1000*l.* in discharge of his claim on Lord *Egmont*, obtained a rule *nisi* to set off the costs payable by the Plaintiff in the action with *Pigott*, against the judgment in the action with Lord *Egmont*.

Wilde and *Jones* Serjts. shewed cause, upon an affidavit which stated that after the offer made by *Adey* to the Plaintiff, discoveries had been made by which the Court of Chancery had been induced to stay the proceedings on the judgment against Lord *Egmont*, and to direct a Master to investigate the Plaintiff's accounts; an investigation which was still pending. But they relied on the objection, that the two actions were not between the same parties; for, admitting that *Adey* had acted for Lord *Egmont* in some particulars, the indemnity given by him in the action against the sheriff, was not given on behalf of Lord *Egmont*, but of the trustees under the deed of 1824, and the general body of creditors.

Cross Serjt. contended, that as the trustees represented Lord *Egmont* he must be considered the real Defendant in the action against the sheriff.

TINDAL C. J. The question upon the rule is, are the costs payable by the Plaintiff in his action against the sheriff, to be written off against the debt due to him on his judgment against Lord *Egmont*? Are the funds to be resorted to in the two actions substantially the same?

same? Even supposing the trustees to be substantially the Defendants in the action against the sheriff, the action is hostile to them, and to the parties whom they represent; the Plaintiff, in suing the sheriff, seeks to obtain a priority over the other creditors of Lord *Egmont*. To yield to this application, would be to give him the priority to the extent of the costs in that action, and enable him to fight the question at the expense of the creditors at large. It is clear, therefore, that the two suits are not substantially between the same parties, and the rule must be discharged.

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GASELEE J. I am of the same opinion; we could not, in any view of the case, set off one demand against the other without going into the Plaintiff's account, and that account is now before the Court of Chancery.

BOSANQUET J. The ground for this application, namely, that the parties are substantially the same, entirely fails. One action is against the sheriff; the other against the Earl of *Egmont*. The sheriff is indemnified by trustees for creditors, among whom the Plaintiff is one, and the Earl of *Egmont* is only so far interested as respects the surplus, if any, after the discharge of the trust. The trust-deed is the deed of the creditors, and the suit against the sheriff is substantially a suit against them.

ALDERSON J. I am of the same opinion. In applications, like this, to the equitable jurisdiction of the Court, we must see our way clearly before we interpose. In the present case, we might do gross injustice by acceding to the Plaintiff's demand. If the estate of Lord *Egmont* be insolvent, we should injure the other creditors. If it be solvent, the Plaintiff in the long run will be indemnified for his loss.

Rule discharged.

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Nov. 24.

ANDREWS v. THORNTON.

The Court refused to discharge the rule for a special jury, on the ground that the Defendant had obtained it in *January 1831*, and up to the *Michaelmas* term following had omitted to strike the jury, although the cause stood for trial in *July*.

THE Defendant, after notice of trial, served a rule for a special jury on the 31st of *January* last. The cause, which was an action for slander, stood for trial on the 8th of *July*, but did not come on. The Defendant having up to the present time omitted to strike his special jury,

Wilde Serjt. obtained a rule *nisi* to discharge the rule of the 31st of *January*.

Spankie Serjt., who shewed cause, referred to *Bloxam v. Brown* (a), *Tripp v. Patmore* (b), and *Thorne v. Marquess of Londonderry* (c), contending that the Court would not discharge the rule for a special jury unless it were distinctly sworn that the cause was not proper to be tried by a special jury, and that delay alone was the object which the party had in view.

Wilde. The present case is distinguishable from those which have been cited; for the Defendant here, by omitting to strike his special jury for such a length of time after notice to try by a common jury, has in effect abandoned his rule. By striking the special jury now, he will be enabled to postpone the trial till after *Hilary* term.

TINDAL C. J. A rule must be made in future to obviate this inconvenience. But I cannot say the Defendant here has so far erred as to exclude himself from the right to a special jury; at the same time, as there

(a) 4 Taunt. 470.

(b) 4 B. M. 470.

(c) *Ante*, 26.

has

has been cause for complaint, the rule must be discharged without costs.

Rule discharged accordingly.

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BOWER v. JONES.

Nov. 24.

IN an action against the Defendant as guarantee of *Benjamin Tupling*, an arbitrator found specially, that on the 2d of *January* 1826, it was agreed between the Plaintiff and *B. Tupling*, that the said *B. Tupling* should become the agent for the sale of the Plaintiff's manufactured stock of goods in *London* and its vicinity, for which the Plaintiff was to pay him a commission of 5*l.* per cent. on all goods sold or orders executed through the *London* markets, the Plaintiff to be responsible for all bad debts contracted in his name for the purpose of carrying on his business, and to allow the said *B. Tupling* to draw his commission monthly, he, *B. Tupling*, at the same time undertaking to make due remittances from time to time of monies received on account of the Plaintiff, and to make up all the accounts monthly; also to give security that the amount of stock and book debts should be appropriated solely for the use of the Plaintiff: That on the 9th of *January* 1826 the Defendant duly executed a guaranty in writing to the Plaintiff, in the words and figures following; — "In consequence of an agreement entered into the 2d of *January* 1826, by *Joseph Bower* to supply *Benjamin Tupling* with stock of plated goods to sell for him on commission, I hereby agree as surety to guarantee Mr. *Bower* to the amount of 200*l.* for a due return of the stock in hand, and payment of the monies received on account of the said *Joseph Bower*, agreeably to the engagement subsisting between them. *Samuel Jones*:" Upon the faith of

By agreement, *T.*, an agent, was to have a commission on all sales effected, or orders executed by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts: Held, notwithstanding, that under the terms of this agreement *T.* was entitled to commission on bad debts.

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which guaranty the Plaintiff employed the said *Benjamin Tupling* to sell goods for him on commission, according to the terms of the aforesaid agreement. That it was not the custom of the trade to which the Plaintiff belonged to allow a commission to agents upon bad debts, but that *B. Tupling* did from time to time credit himself in his account with the Plaintiff with certain sums for commission on certain sales effected by the said *B. Tupling* on behalf of the Plaintiff, which afterwards turned out to be unproductive through the insolvency of the purchasers, and which commission on such bad debts amounted to 14*l.* 8*s.* That if *Tupling* had no claim to place this 14*l.* 8*s.* to the credit side of his account with the Plaintiff, there was a balance due to the Plaintiff of 8*l.* 11*s.* 3*d.* exclusive of the sum of 27*l.* 4*s.* 10*d.* paid into Court by the Defendant on account of the action; and exclusive also of the further sums thereafter mentioned. That *B. Tupling* transmitted from time to time, at intervals of about three months, returns of the amount of sales made and cash received by him on account of the Plaintiff. That in the return sheet dated the 30th of *June* 1828, there was an entry amongst others of certain goods there specified, amounting to 16*l.* 2*s.* 3*d.* as having been sold by *B. Tupling* to himself on the 17th of *May* 1828, which goods were subsequently paid for by *B. Tupling* in due course. That in the return sheet dated the 29th of *September* 1828, there was a similar entry of goods amounting to 38*l.* 6*s.* 3*d.* as having been in like manner sold by the said *B. Tupling* to himself, on the 28th of *August* 1828, for which he accepted a bill drawn by the Plaintiff on the 9th of *October* 1828, which bill was twice renewed, the last time on the 24th of *March* 1829; but neither the original nor either of the renewed bills was ever paid. That in the return sheet dated the 10th of *December* 1828, there was a similar entry of
a sale

a sale of goods by the said *B. Tupling* to himself, on the 21st of *November* 1828, amounting to 13*l.* 2*s.* 6*d.*, for which no payment was ever made. That at the close of the year 1828 the Plaintiff came to town, and personally investigated the said *B. Tupling's* accounts, but could not agree with him in balancing them. That the said *B. Tupling* in his return sheet, dated the 29th of *December* 1828, debited himself in the sum of 68*l.* 14*s.* 6*d.* for goods sold by him, *B. Tupling*, to himself, which he entered in one gross sum under the designation of "sundries," and without any particular date or dates, there having been before no entry of sales made by him without specifying the details of the articles alleged to have been sold. That in the last return sheet furnished by the said *B. Tupling* on the 30th of *March* 1829, there was an entry of goods, the particulars of which were specified as having been sold by *B. Tupling* to himself on the 31st of *January* 1829, amounting to 19*l.* 14*s.*; and another entry of a similar alleged sale to himself on the 20th of *February* 1829, amounting to 23*l.* 16*s.*, the particulars of which were not specified. That for some time previously to the date of the last-mentioned return, the said *B. Tupling* was in embarrassed circumstances, and shortly afterwards took the benefit of the insolvent act, having previously, however, in pursuance of the Plaintiff's directions, returned to him the remainder of the goods then in his possession unsold, amounting in value to upwards of 600*l.* That no part of the amount of the said several alleged sales from the said *B. Tupling* to himself was ever paid or settled for, either in cash or by securities, except the two first as before mentioned. That the Plaintiff never remonstrated with the said *B. Tupling* upon his debiting himself with the said alleged sales or any of them, nor ever expressed any objection thereto. That considering the state of the said *B. Tupling's* circumstances at that

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period, and the form in which the entry of the 29th of *December* 1828 was made, the arbitrator was of opinion that that entry, or alleged sale, and those of the 31st of *January* 1829, and 20th of *February* 1829, were expedients to which the said *B. Tupling*, deeming the former alleged sales to himself to have been sanctioned by the Plaintiff, had recourse, in order to enable him to meet deficiencies in his accounts with the Plaintiff, and not for the purpose of re-selling the goods to customers of his own for a profit in the regular way of his trade. That the Plaintiff, in a letter addressed to *B. Tupling* on the 19th of *February* 1829, when referring to the general state of the accounts between them, included the amount of the alleged sales to *Tupling* under the head of "accounts owing." That in another letter addressed to *B. Tupling* on the 31st of *March* 1829, the Plaintiff used the words "You can surely send me 20*l.* on your own account." And a subsequent letter dated the 7th of *April* 1829, and addressed to *B. Tupling* by the Plaintiff, contained the following passage:—"I am sorry to hear that your health will not permit you to follow your business: although we have been hitherto unfortunate in our business, I should have felt much pleasure in keeping up a correspondence and doing a little business with you. As for the agency business it does not answer; that I need not tell you; therefore the sooner it is given up the better."

The arbitrator then awarded and adjudged that the Plaintiff was entitled to recover of and from the Defendant under and by virtue of the said guaranty, exclusive of the said sum of 27*l.* 4*s.* 10*d.* paid into Court as aforesaid, the said sum of 8*l.* 11*s.* 3*d.*, if the Court should be of opinion that the Plaintiff was by law entitled to disallow as between him and the Defendant all those sums for which credit was taken by *Tupling* as commission on sales which subsequently turned out to be unproductive, owing to the

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the insolvency of the purchasers: and further awarded and adjudged that the Plaintiff was entitled to recover of and from the Defendant, under and by virtue of the said guaranty, the said several sums of 13*l.* 2*s.* 6*d.*, 68*l.* 14*s.* 6*d.*, 19*l.* 4*s.*, and 29*l.* 16*s.*, in addition to the said sum of 8*l.* 11*s.* 3*d.*, if the Court should be of opinion that the conduct observed by the Plaintiff in reference to the said alleged sales by *B. Tupling* to himself, did not amount in point of law to a sanction of the said transactions, so as to discharge the Defendant's liability in respect of the amount thereof, — which said several sums amounted altogether to 133*l.* 8*s.* 6*d.*, — and then directed that a verdict should be entered for the Plaintiff for the said sum of 133*l.* 8*s.* 6*d.*, subject to the opinion of the Court; but if the Court should be of opinion that the Plaintiff could not, in point of law, disallow the said credits for commission on the bad debts as aforesaid, and by his conduct had discharged the Defendant from all liability in respect of the amount of the said alleged sales to *B. Tupling*, in that case he directed that a verdict should be entered for the Defendant.

Wilde Serjt. having obtained a rule *nisi* to enter up a verdict for the Plaintiff pursuant to the award,

Jones Serjt. shewed cause. The Defendant is entitled to the verdict. First, by the express terms of the agreement *Tupling* is entitled to commission on bad debts; for he is to have the commission on *all* goods sold; the Plaintiff is to be responsible for bad debts; and *Tupling* is to draw his commission monthly. The custom of the trade cannot prevail against an express agreement.

Secondly, the loss upon the sales made by *Tupling* to himself is not within the scope of the Defendant's guaranty. *Tupling* has transmitted all the money he

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received, and has returned all the stock on hand; and the Defendant's guaranty extends to no other matters. The course of dealing between the parties, and the Plaintiff's letters, shew that the Plaintiff never objected to the sales made by *Tupling* to himself; and as he permitted those sales to go on after *Tupling* had been under the necessity of renewing his bill for payment, the Plaintiff must take the consequence of his own remissness, and not cast it on the Defendant. In *Bartlett v. Pentland* (a) Lord *Tenterden* says, "If the plaintiffs had by their neglect, even though that neglect had been induced by the misrepresentation of their agent, placed the defendant in a situation different from that which he might have been in if no such neglect had taken place, there might be ground for contending that, in point of justice, they, and not the defendant, ought to be losers."

Wilde. The parties must be presumed to have been dealing according to the custom of the trade, which would exclude the 14*l.* 8*s.* claimed for commission on bad debts. It could never be the intention of the parties that the Plaintiff should lose his goods and pay commission for the loss. Then, with respect to the sales alleged to have been made by *Tupling* to himself, the Plaintiff may be admitted to have recognized the three first, having received payment on one, having consented to renew a bill on the other, and the third standing unimpeached on the award; but the three subsequent sales, styled in the award *expedients*, are in effect admissions that the amount of them, 68*l.* 14*s.* 6*d.*, 19*l.* 14*s.*, and 23*l.* 16*s.*, was so much money had and received by *Tupling* to the Plaintiff's use, under sales made to others, and falsely ascribed to himself; money

(a) 10 B. & C. 770.

which

which he has omitted to pay over, and for which the Defendant is therefore responsible under the terms of his guaranty.

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The Court thought that by the express terms of the agreement between the Plaintiff and *Tupling*, *Tupling* was entitled to the commission on the bad debts, but that the Defendant was liable, under the terms of his guaranty, to make good the three sums which *Tupling* had, as an expedient, entered as sales to himself, the entry by way of expedient implying that the money had been received to the Plaintiff's use upon sales to other persons, and falsely entered as sales to *Tupling*; whereupon the judgment was ordered to be entered up for the amount of those three sums, and the balance of 8*l*.1*l*s.3*d*. found by the arbitrator, minus 14*l*. 8*s*. commission on the bad debts.

Judgment for Plaintiff accordingly.

TALBOT v. BINNS and Another.

Nov. 25.

A WRIT of *pone* had been issued in this case as follows:—

The cause assigned at the end of a writ of *pone* is mere form, and cannot be traversed by the sheriff.

“*William* the Fourth, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland* King, Defender of the Faith. To the sheriff of *Yorkshire*, greeting. Lay before our justices at *Westminster*, on the 31st day of *October*, the plaint which is in your county by our writ, between *Joseph Talbot* and *Joseph Binns* and *Anthony Hornby*, of a plea of trespass upon the case; and give notice to the said *Talbot* that he be there ready to prosecute his plaint thereupon against

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the said *Joseph Binns* and *Anthony*, if he be willing, and have there this writ and the other writ. Witness, ourself, at *Westminster*, the 21st day of *June*, in the first year of our reign:

“ Because the said *Joseph Binns* and *Anthony*, for the favour which the said *Joseph Talbot* hath in the said county; cannot obtain justice, as it is said, let this writ be executed, if the cause be true, and the said *Joseph Binns* and *Anthony* desire it, and not otherwise.”

To which the sheriff made the following return: —

“ My answer to this writ appears in a certain schedule hereunto annexed.

“ *Harry James Goodricke*, sheriff.

“ I, Sir *Harry James Goodricke*, Bart. sheriff of the county of *York*, do hereby humbly certify and return to our lord the king, that the writ hereunto annexed, and to me directed, was delivered to me on the 28th day of *June* last past, being the day before my county court held at the castle of *York* in and for the same county, on *Wednesday*, the 29th day of the same *June*, on which day the issue joined between the said parties named in the said writ was appointed for trial, and I did thereupon in my said county court cause the said writ to be openly read: whereupon and before the allowance of the said writ before the suitors of the same court, then and there came the Plaintiff named in the said writ, to wit, *Joseph Talbot*, and then and there alleged that the Defendants named in the said writ, to wit, *Joseph Binns* and *Anthony Hornby* had sued out and procured the said writ for the purpose of harassing him the said Plaintiff by unjust and unnecessary delays, and thereby preventing the recovery of the money and damages sought to be recovered of them the said Defendants by the said Plaintiff in and by the said plaint: and the said *Joseph Talbot* further then and there alleged, that

that the cause set forth at the foot of the said writ, was falsely and untruly so set forth by or at the suggestion of the said *Joseph Binns* and *Anthony Hornby*; and thereupon the said *Joseph Talbot* then and there traversed and denied the truth of the cause so set forth at the foot of the said writ for the execution thereof, and offered then and there to prove that such cause so stated was untrue, and thereof put himself upon the country; and the said *Joseph Binns* and *Anthony Hornby* being solemnly called to answer the said allegations so alleged and made by him the said *Joseph Talbot*, and to prove the truth of the cause so set forth by them for the execution of the said writ, then and there neglected to make any answer or to join issue upon the traverse so made by him the said *Joseph Talbot* as aforesaid, whereupon it was adjudged by the suitors of the said court that the cause assigned for execution of the said writ at the foot thereof was untrue, and, therefore, that I ought not to put the plaint in the said writ mentioned before his said majesty as within I am commanded, wherefore I could not execute the said writ the cause therein alleged for the execution thereof not being true.

“The answer of Sir *Harry James Goodricke*, sheriff.”

Jones Serjt., on the part of the Defendants, obtained a rule *nisi* to set aside this return on an affidavit that interlocutory judgment was signed in the county court before the Defendants had pleaded; that no issue was ever joined; and that a writ of enquiry was executed the day after the writ of *pone* was lodged with the clerk of the county court. He contended that it was imperative on the sheriff to return the plaint, and that he could not traverse the formal cause alleged for issuing the *pone*.

Cross Serjt. shewed cause on an affidavit, which stated, that the action was brought to recover 6*l.* 12*s.* 6*d.*,
the

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the balance of a blacksmith's bill; that the Defendants had, on the 19th of *February*, been duly served with a writ of *justicies*, and on the 6th of *April* with particulars of demand; had imparled; had repeatedly asked for time, and had been advised by their attornies to settle, the Plaintiff having agreed to make a small abatement; that judgment was suffered by default, and notice of enquiry given on the 14th of *June*; and that the Defendants were three times called on in the county court to substantiate the truth of the allegation in their writ of *pone*, but that neither they nor their agent appeared.

Cross admitted that it might be imperative on the sheriff to return the plaint when the *pone* is issued by the *Plaintiff*, because in his case the writ contains no allegation of the cause for issuing the *pone*, nor an injunction to the sheriff to act only if that allegation be true. But a defendant cannot sue out a *pone* without alleging a cause. *Fitz. N. B.* 119.; and to prevent vexation and delay upon so small a demand, the Court would hold him to the letter of his writ. The whole proceeding was disgraceful to the administration of justice.

Sed per Curiam. That is an observation for the legislature. We cannot alter the practice of centuries. The allegation of cause for a writ of *pone* is a mere matter of form; as much so as the allegation of latitancy upon mesne process, or the affection of *John Doe* for the tenant in possession. In all the books there is not a single instance of such a return as the present.

Rule absolute.

See *F. N. B.* 70.

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WALFORD v. ANTHONY, HAYCOCK, and COOKE. Nov. 25.

TRESPASS. The declaration stated, that *Anthony*, The declaration stated that Defendants *A., H., and C.* broke a close of the Plaintiff abutting on a close of the said Defendant. The Plaintiff's close abutted on a close of the Defendant *A.* : Held, an ambiguity, and not a variance.

Haycock, and *Cooke*, the Defendants in this suit, were attached to answer *Walford*, the Plaintiff, for that the Defendants had broken and entered a close of the Plaintiff in the parish of *Boreham*, abutting towards the north on a close of the said Defendant, and towards the south on *Blind Lane*. There was a second count for cutting down trees, and a third for carrying them away.

The Defendants pleaded, first, not guilty; and then four pleas, alleging a right of way in various forms.

The Plaintiff joined issue on the first plea; traversed the right of way in the four others, and newly assigned excess in the assertion of the right.

The Defendants joined issue on the traverses to the right of way, and pleaded to the new assignment, first, not guilty, and then four special pleas to so much of the new assignment as related to the trespasses whereof the Plaintiff had complained in his second and third counts, and which were not justified in the Defendants' second, third, fourth, and fifth pleas.

The Plaintiff joined issue on the first plea to the new assignment, and traversed the matter alleged in the four others, upon which traverses issue was joined, The pleadings were of great length.

At the trial before *Gaselee J.* it appeared that the close in *Boreham* in which the alleged trespasses had been committed, was bounded on the south, indeed, by *Blind Lane*, but on the north by a close of the Defendant *Anthony*; whereas the allegation in the declaration that it abutted on the north on a close of the said Defendant,

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defendants could only apply, as it was contended on the part of the Defendants, to a close of the Defendant Ooke, he being the last named Defendant, and therefore the only one to whom the participle *said* could refer.

The learned Judge was of this opinion; but offered to go on with the trial if the Plaintiff would apply himself to the merits of the disputed right of way, instead of taking a nominal verdict for the mere excess in the assertion of it. These terms were declined, and the Plaintiff's counsel elected to be nonsuited for the alleged variance.

Stephen Serjt. obtained a rule *nisi* to set aside the nonsuit, contending that the word *said* did not necessarily refer to the last named Defendant, and that it might be applied to such one of the three as the case required; and he urged that the expression *said Defendant* was an ambiguity on the face of the declaration, of which no advantage could be taken except by way of special demurrer.

Jones and Mervether Serjts. shewed cause. In cases like the present the word *said* has always been held to refer to the last antecedent, in order to avoid the inextricable ambiguity which would otherwise present itself. Thus in *Morgan's Case* (a) the indictment, which was in *Somerset*, stated that *Thomas Morgan* nuper de D. in com. Dorset. gen. apud W. in comitat. prædict. did strike and kill *Turberville*; and the indictment was held void because *prædict.* must be intended in Com. Dorset, which was last mentioned. In *Pollard v. Lock* (b), in an information against *Lock*, two *Locks* being named, the *prædict.* was held to refer to the

(a) *Cro. Eliz.* 101.

(b) *Cro. Eliz.* 267.

latter.

latter. *Rex v. Gripe* (a) was ruled on the same principle, and in *Childe v. Tamers* (b), where the venue was laid in *Warwickshire*, and the plaintiff declared that the defendant being possessed at *Norton*, in the county of *Northampton*, assumed *apud Stonely* in com. prædict., and the *venire facias* was awarded *de Stonely* in com. War.; it was held a mis-trial, for *apud Stonely* in com. prædict. shall be intended in com. North., which is last named. [Alderson J. In *R. v. Moor Critchill* (c), where two counties were named in an order of removal, it was held, that the word *said* did not refer to the last.] That case was decided on the ground that the jurisdiction of magistrates ought to appear without ambiguity.

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Stephen Morgan's Case was over-ruled by *Sterley v. Sackville*. (d) And *Pollard v. Lock*, *R. v. Gripe*, and *Childe v. Tamers*, were ruled on the ground of ambiguity, not of variance. It is clear that *prædictus* does not necessarily refer to the last antecedent, though it is otherwise as to the word *idem*. *Co. Litt.* 20 b.

TINDAL C. J. The question is, whether there has been a variance in this case, or a defective and ambiguous description; and I think the objection on the record is of the latter, and not of the former class. The Defendants, three in number, are put together under one appellation by the term *Defendants*. That is a modern practice; for the old course was to name each individual, and if that course had been pursued, the present difficulty would probably never have occurred. The declaration then states, that a trespass was committed in a close abutting on a certain close of the said *Defendant*.

(a) *Ld. Raym.* 261.

(b) *Cro. Eliz.* 311.

(c) 2 *East*, 66.

(d) *Cro. Eliz.* 165.

That

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That would have raised a doubt in the mind of any one perusing the record, and I should have said immediately, "Which Defendant?" But it would also have given a very inconvenient latitude to the party proceeding to trial; for he might have selected the close of one or the other of them, as should appear best to suit his purpose. If all the three Defendants had been named through the record, the doubt would only have been more prominent. If we could read it "the close of the said *Defendants*," it would be an undisputed variance; but, as it stands, it is rather an ambiguity, and a nonsuit on the ground of variance cannot be supported. As there was, however, on the part of the Plaintiff's counsel, something like a desire to be nonsuited, we think the costs of the nonsuit should abide the event of the new trial, the Defendants being permitted to suffer judgment by default on the new assignment.

GABELEE and BOSANQUET Js. concurred.

ALDERSON J. A variance can only be where there is a clear discrepancy between averment and proof. If there is an ambiguity in averment, the difference cannot be clear, because the proof may be true in one sense. In the authorities cited from *Cro. Eliz.*, the difficulty was occasioned by the mention of one county in the margin, and a different county in the body of the record, and it was held, in conformity with all the decisions, that the county in the body of the record is that to which the proceedings properly have relation. But in *Bishop v. Grant* (a), where, in error, upon an assize of rent-seck, the Plaintiff made title to rent granted, to be paid yearly at the four feasts, *Christmas, Annunciation, St. John the Baptist, and Michaelmas*, and shewed

(a) *Cro. Eliz.* 324.

rent arrear for four years at the *Annunciation* last past, which Plaintiff demanded *in crastino prædict. festi Purificationis*, the error assigned was, that no feast of the *Purification* is mentioned before, so that it appeareth not that the demand was after the rent was due; *Foster* moved that the word "*Purification*" shall be void and surplusage; but *Gawdy* said, "although the word '*Purification*' be void, yet *prædict. festum* cannot refer to the last feast, for there are divers feasts mentioned, so it cannot be referred to any one certain.

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WALFORD

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Rule absolute:

PALMER v. MARSHALL.

Nov. 25.

THIS was an action on a policy of assurance for 1500*l.* on the yacht *Ruby*, at and from *Bristol* to *London*. The policy bore date the 28th of *January* 1831. The declaration stated, that the Plaintiff had effected it by *M'Ghie* and *Page*, his agents in that behalf, and averred a loss by being run down by another vessel through the violence of winds and waves.

A policy on ship at and from *Bristol* to *London*, attaches during the vessel's stay at *Bristol*; therefore, where the assured did not sail till three months after the execution of the policy, Held, that the delay was a material variation of the risk.

At the trial before *Taunton J.*, last *Dorchester* assizes, it appeared that the *Ruby*, a yacht of thirty-seven tons, not coppered, at the date of the policy was lying in the float at *Bristol*, where she continued till the 17th of *May*, when she commenced her voyage round the *Land's End*, and was run down off the *Start* on the 21st of *May*.

The Defendant's subscription to the policy was admitted, and it was shewn that the Plaintiff was the only person interested in the vessel: but there was no express proof that *M'Ghie* and *Page* were the Plaintiff's agents.

The

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The omission of this proof was objected to on the part of the Defendant, as a fatal defect in the Plaintiff's case, but the objection was overruled.

It was also objected, that the voyage having been deferred for so long a time after the date of the policy, the risk contemplated had been essentially varied, and that the Defendant was, therefore, discharged by a *quasi* deviation; but the learned Judge held, that upon this policy the risk did not attach till the vessel commenced her voyage, and left it to the jury to say whether the vessel had been lost in the voyage intended. The jury found for the Plaintiff, and also, that the risk had not been varied.

Wilde Serjt. obtained a rule *nisi* to set aside the verdict, on the two objections urged at the trial, and also, as against evidence.

Merewether Serjt. shewed cause. The proof that no other person was interested in the vessel, connected with the statement on the policy subscribed by the Defendant, that it had been effected by *M'Ghie* and *Page* as agents, is sufficient evidence that they were agents for the Plaintiff.

As to the alleged deviation, or variation of risk, the learned Judge correctly left it to the jury to say whether the vessel had been lost in the course of the voyage intended; for upon insurances at and from a given place, the risk only attaches when the vessel is ready to begin her voyage from the place specified. Thus, when ships are engaged on the banks of *Newfoundland* in the pursuits which are termed *banking*, the risk on a policy on ship at and from *Newfoundland* to *Europe*, attaches only from the time when the *banking* ends. *Vallance v. Dewar*. (a) So, in *Williamson v.*

(a) 1 *Campb.* 503.

Innes (a), the risk on a policy *at and from Algoa Bay* to London, was held to attach only when the ship was in a condition to take in her homeward cargo at Algoa Bay. Here the jury have found that there was no variation of the risk, which distinguishes the case from

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DARNER

v.

MARRILL.

(a) WILLIAMSON v. INNES.

Sittings in London. Exchequer. 13th May 1831.

Coram LYNTHURST C. B.

Assumpsit on policy, on freight *at and from Algoa Bay* and *Table Bay*, both or either, to London.

Declaration stated that the ship had arrived, and was in good safety, at *Algoa Bay*, that a homeward cargo was ready for her under her charterparty, and that before it was put on board she was lost by perils of the sea.

Plea, general issue.

At the trial, the captain proved his arrival at *Table Bay*; the discharge of that part of the cargo which was destined for that place; and that he took in about sixty tons of goods for *Algoa Bay*, where he arrived on the 30th of September, and came to anchor. Till the 8th of October he was engaged in discharging his outward cargo, but on that day he gave orders that no more of the outward cargo should be discharged till some of the homeward cargo should be on board, as his load was reduced to about seventy tons, which, in his judgment, was necessary for the safety of the ship, of 144 tons register; and he intended to take in, the next morning, part of the

homeward cargo, which was ready for him.

Before that time, however, the ship was lost in a hurricane.

For the Defendant, it was contended, that at the time of the loss, the ship was not in a state to begin to take in her homeward cargo, and consequently that the voyage at and from *Algoa Bay* had not commenced.

Several captains of vessels were called, who stated that, in their judgment, thirty tons were quite sufficient to keep in the ship for her safety, and that with seventy tons of her outward cargo on board she could not be ready to take in her homeward cargo.

Lord LYNTHURST C. B. told the jury that if the ship was in a condition to begin to take in her homeward cargo, the Plaintiff was entitled to recover; if not, then the verdict ought to be for the Defendant.

Verdict for the Plaintiff.

F. Pollock and Gresswell for the Plaintiff.

Campbell and Mowle for the Defendant.

Homeward policy on freight, *at and from Algoa*, attaches, when the ship is at *A.* in a condition to begin to take in her homeward cargo.

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Mount v. Larkins (a), where it was expressly found that that there had been unreasonable delay.

TINDAL C. J. This cause must be sent down to another jury. The learned Judge who tried it, did not state accurately the time at which the risk attached. The policy was *at and from Bristol to London*; and though there are excepted cases in which the risk would not attach on such a policy until the time of sailing, as where a ship is not finished, or is undergoing a course of repair at the time the policy is effected, yet here, where the vessel was lying in port, complete and ready for sea, the risk on the policy could only commence from its date. Besides this, the evidence was not complete as to the agency. The statute 25 G. 3. c. 44. requires that the names of persons interested shall be inserted in the policy, or the names of persons who shall effect the same as agents for persons interested. And the declaration states, that the Plaintiff, by *M'Ghie and Page*, his agents in that behalf, caused to be made a certain policy of insurance; but the evidence only amounts to proof of the Defendant's subscription, and the Plaintiff's interest in the vessel. No proof was offered that *M'Ghie and Page* were his agents.

GASELEE J. In *Vallance v. Dewar*, and other cases where the risk on policies at and from a place has been held not to attach till the time of departure, there has been evidence of a particular usage to that effect. But there is no evidence to take this case out of the general rule. The direction to the jury, therefore, was not correct. As to the proof of agency, the admission at the trial proved nothing more than the handwriting of the Defendant.

(a) *Port*, 108.

BOSAN-

BOSANQUET J. I am of the same opinion. In policies at and from a given place, the risk attaches while the vessel is at the place, unless in certain excepted cases, of which this is not one. The risk here attached on the vessel as long as she was at *Bristol*. *Williamson v. Innes* was a policy on freight, which could not take effect till the cargo was on board. Here, also, there was an entire failure in the proof of agency. It was not sufficient to prove the Defendant's subscription of the policy; the Plaintiff was bound to shew for whom *M'Ghie* was agent.

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v.
MARSHALL.

Rule absolute.

ELWOOD v. PEARCE.

Nov. 25.

WILDE Serjt. obtained a rule *nisi* to allow the attorney in this cause the costs of taxing his bill; less than a sixth having been taken off. The claim had been made, and disallowed by the prothonotary.

Where nearly a sixth was taken off an attorney's bill upon taxation the Court refused to allow him the costs of taxation.

Andrews Serjt., who shewed cause, objected, that upon an amount of 184*l.* 14*s.* 8*d.*, 25*l.* 14*s.* 8*d.* had been taken off, being nearly a sixth; that the applicant had received the amount of his bill since taxation; and that therefore the application was too late. *Whitfield v. James.* (a)

Wilde. In *Whitfield v. James* the attorney omitted to claim the costs at the time of taxation. In *Barker*

(a) 1 *Bingb.* 207.

1831.

ELWOOD

v.

PEARCE.

v. *Bishop of London* (a) it is said, "By statute 2 G. 2. c. 23. s. 23., if a sixth part of an attorney's bill be deducted, the Court are not left to their discretion, but are obliged to award costs of the taxation against the attorney; where a sixth part is not deducted, the Court are left to their discretion. The statute is a good guide; what it directs in one case seems to be a right rule in the other: ever since the statute, costs of taxation have been reciprocally given to the party charged, and to the attorney, as a sixth part has, or has not, been taken off." By the statute, too, the discretion is reposed in the Court according to the reasonableness or unreasonableness of the bill; and it is not alleged here that the bill is unreasonable.

TINDAL C. J. The act of parliament says, that if less than a sixth part of the bill be taken off upon taxation, the Court at discretion may charge the attorney or client with such costs according to the reasonableness or unreasonableness of the bill. This is a case in which the Court may exercise its discretion; and if the amount taken off the bill approaches so nearly to a sixth, we ought not to be called on by an officer of the Court to allow the costs of taxation.

Rule discharged.

(a) *Barnes*, 147.

1831.

PARKER and Others v. BOOTH.

Nov. 25.

UPON a rule calling on the Plaintiffs to shew cause why the time for returning the *fi. fa.* in this case should not be enlarged till the sheriff should be indemnified by one of the parties, the Court made the following order, being the first proceeding under the statute 1 & 2 W. 4. c. 58. for the protection of the sheriff: —

Practice.
Protection of
sheriff.

“ Upon reading a rule made in this cause, *Monday, 14th of November* instant, the affidavit of *Henry Broomhead*, gent., and the affidavit of *Andrew Duncan*, gent., and upon hearing counsel as well for the sheriff of the county of *York* as for the Plaintiffs, it is ordered, that the said sheriff do pay over to the Plaintiffs the money levied under the writ of *fi. fa.* issued in this cause, minus the poundage, upon the Plaintiffs giving security, by bond or otherwise, to the satisfaction of one of the prothonotaries of this Court, that they the said Plaintiffs will pay over such sum of money to the assignees when chosen under the commission of bankrupt issued against the Defendant, provided such assignees shall be found entitled to the same; or, in case the said Plaintiffs shall not give such security as shall be satisfactory to the said prothonotary, then that the said sheriff do pay the said sum of money into the hands of the prothonotaries of this Court, to abide the event of the question as to who is entitled to the same. And it is further ordered, that the question as to who is entitled to the said sum of money be tried by a feigned issue, in which the said assignees of the Defendant are to be Plaintiffs, and the said Plaintiffs are to be Defendants; and that the questions of poundage and costs are to be reserved until the event of such issue. And it is further ordered, that all further proceedings against the said

sheriff

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PARKER

v.

BOOTH.

sheriff for not returning the said writ of *fi fa* be stayed until the further order of this Court."

In a similar case in K. B. the rule had been drawn up in the same terms.

In another case of the same description in this Court, *Northcot v. Beauchamp and Others*, the Court refused the assignee his costs of the rule; and with respect to the sheriff's costs, which were claimed, took time to confer with the Court of K. B.

Nov. 23.

GINGELL v. GLASCOCK.

Plaintiff remitted to Defendant the price of some hay he had sold for Defendant, before the money had been paid by the purchaser, and then sent Defendant's servant with the hay to the purchaser.

The servant having been cheated of the hay before he arrived at the purchaser's: Held, the Defendant was liable to refund the money remitted.

THE Plaintiff, a hay salesman, sold for the Defendant a load of hay, to a person named *Sumner*, and remitted 4*l.* 16*s.*, the price of the hay, to Defendant, before *Sumner* paid the money. In the mean time the servant, whom the Defendant sent up to *London* with the hay, being charged by the Plaintiff to deliver it to the purchaser, was imposed upon by some cheat who personated *Sumner*, and in that way got possession of the hay, and had not since been discovered. *Sumner*, not having received the hay, could not be prevailed on to pay, and the Defendant refused to return the money which he had received from the Plaintiff, who accordingly brought an action; but by consent the case was submitted to an arbitrator, who awarded for the Plaintiff.

Jones Serjt. now moved for a rule to shew cause why the award should not be set aside. He argued, that the man who delivered the hay to the wrong person, was not then acting as the servant of the Defendant, who had sent him only to the market, but as the servant of the Plaintiff, who had employed him to carry the hay to *Sumner*; and that the Plaintiff was responsible for the hay,

hay, or the price of it, from the moment when it was taken out of the market by his direction.

1831.

GINGELL

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The *Court* was of opinion that the arbitrator had decided rightly; that the servant who made the mistake was, at the time, acting as the servant of the Defendant; and, accordingly, the award was confirmed.

Rule refused.

ARNELL the Younger v. BEAN and Another.

Nov. 25.

TRESPASS and assault.

Pleas, *son assault demesne*, and that the Plaintiff was wrongfully and unlawfully, and without leave or licence, in a certain dwelling-house, farmstead, and closes, belonging to Defendant *Bean* and one *W. Park*, and because he refused to go out upon request, the Defendant *Bean* and his servant gently laid their hands upon him to prevent his continuing there.

Replication, *de injuriâ*, and issue thereon.

At the trial before *Vaughan B.*, last *York* assizes, it appeared that the Plaintiff's father, who occupied a farm, was, on the 6th of *April* last, about to be distrained on by his landlord for 70*l.*, when he applied to the Defendant *Bean* and *W. Park* to relieve him from his difficulties.

As he already owed *Bean* and *Park* nearly 600*l.* on a warrant of attorney and promissory notes, they refused to make any further advance without security; whereupon the Plaintiff's father, by deed, reciting his debts, and that *Bean* had further paid 70*l.*, assigned to them all his personal estate, growing crops and effects, in trust by sale or otherwise to pay themselves, and the

A., being distrained on for rent arrear, applied to Defendant, to whom he was already indebted, to advance him money; Defendant refused to do so unless upon security; whereupon *A.* assigned to him all his personal estate and effects in trust to pay Defendant and other creditors: Held, not a voluntary conveyance within 7 *G. 4. c. 57. s. 32.*

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surplus, if any, to various other creditors. *Bean* then paid the 70% to the landlord, and took possession of the premises. About a fortnight afterwards, suspecting the conduct of their debtor, *Bean* and *Park* sold the property by auction, with the exception of the growing crops, of which they retained possession, when the Plaintiff's father went to prison at the suit of an alleged creditor, petitioned to be discharged under the insolvent debtors act, and assigned all his estate and effects in the usual way to the provisional assignee. *Bean* and *Park* opposed the insolvent's discharge, and his son, the Plaintiff, refused to quit the farm, alleging that he had authority to remain from the provisional assignee. The Defendants insisting on his departure, the assault complained of took place.

On the part of the Plaintiff it was contended, that the conveyance by his father to *Bean* and *Park* was void under 7 G. 4. c. 57. s. 32., which enacts, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act; provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention

intention by the party so conveying, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

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A verdict was found for the Plaintiff, damages 1s., with leave for the Defendants to move to set it aside and enter a nonsuit instead.

Wilde Serjt. having obtained a rule nisi to that effect,

Cross and *Adams* Serjts., who shewed cause, contended that the deed was voluntary within s. 32.; void, as being a conveyance to parties who were already his creditors; and false and fraudulent in the recital that *Park* had joined in advancing the 70*l.*, which, according to the evidence, was paid by *Bean* only. If the Plaintiff's father had been a trader, the conveyance would have amounted to an act of bankruptcy; and if it could be supported in the present instance, a mode was pointed out by which the operation of the insolvent debtors act might be successfully eluded.

Wilde. A voluntary deed within the meaning of s. 32. 7*G.4.*, is a deed executed without any present and pressing consideration; a deed purely spontaneous. A debt, however, is a good present consideration; and here, in addition to the debt, the deed was executed upon the emergency of a distress which the landlord was in a condition to enforce, and from which the tenant was relieved by the advance of 70*l.* at his urgent entreaty, the advance being refused unless the deed were executed. *Bean* and *Park*, therefore, were not volunteers, but purchasers. Even if it were true that *Park* contributed nothing towards the 70*l.*, in *Morgan v. Horseman* (a) it was held that a deed, whereby a debtor, being pressed,

(a) 3 Taunt. 241.

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conveyed estates in trust to sell and pay the pressing creditor, with a further trust to pay debts to certain relations, in order to give them an undue preference in contemplation of bankruptcy, was valid so far as related to the protection of the urgent creditor. Under the bankrupt laws it has always been holden, that a conveyance or payment made upon pressure by a creditor, is not voluntary. (a)

Civ. adv. vult.

TINDAL C. J. The question reserved by the learned Judge who tried this cause, was, whether the assignment made by *Arnell* the elder, to *Bean* and *Park*, bearing date the 6th of April 1831, was a voluntary assignment, within the meaning of the thirty-second section of the insolvent act, the 7 G. 4. c. 57. By that section it is enacted, that if any prisoner who shall file his petition for his discharge under that act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily assign any real or personal property, goods, or effects whatsoever, to or in trust for any creditor, every such assignment shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee appointed under the act.

Now the word "voluntary" in that section must have some proper meaning of its own, distinguishable from that of fraudulent; in the first place, because there could be no occasion to make an enactment that a fraudulent deed should be void, which the common law would have itself declared it to be; and, in the next place, because this very section declares that assignments voluntarily made under the circumstances therein

(a) See *Grosby v. Grouch*, 11 East, 256. *Hunt v. Mortimer*, 10 B. & C. 44. *Thompson v. Vacher v. Cocks*, 1 B. & Adol. 145. *Freeman*, 1 T. R. 135. *Hartsborn v. Sladden*, 2 B. & P. 384.

mentioned,

mentioned, should be deemed, and shall be, fraudulent and void. We think the word "voluntarily" is used in the statute to denote either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence of such considerations, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it. If in any case a doubt arises as to the real value of the consideration, or as to the real motive of the debtor in making the assignment, such question must be decided by the jury, who will determine whether it is a *bonâ fide* transaction, or a mere collusion to evade the statute.

Now, upon the present occasion, no fraud was suggested, and therefore it was unnecessary to leave that point to the jury; and the question, whether voluntary or not, arises upon the legal result of the evidence in the case. But when it is found that *Bean* and *Park* were creditors of *Arnell* to a considerable extent, and that *Bean* advanced to *Arnell* the further sum of 70*l.*, to induce him to assign over his property to them as security, as well for the 70*l.* as also for their debts; in a case where no fraud is suggested, we cannot otherwise consider this than as a purchase of a security by the further advance of the sum of 70*l.*, and therefore, as an assignment, not voluntary within the meaning of the statute. If there had been any doubt as to the real nature of the transaction, or as to the real object of the parties, that point should have been left to the jury. But we think, which is all that it is necessary to decide on this occasion, that this assignment afforded a sufficient justification to the Defendants under the special plea, and that the verdict should be set aside, and a nonsuit entered.

We have the less reluctance in doing this, as it will not prevent the raising the question as to the right to the property between the assignee under the insolvent act, — against which assignee, the statute declares the volun-

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voluntary assignment to be void, — and the present Defendants, if it shall be thought right to try the question. The present form of action is not brought for the purpose of recovering the property for the benefit of the creditors.

Rule absolute.

(IN THE EXCHEQUER CHAMBER.)

Nov. 25.

MILLER v. GREEN.

Defendant made cognizance in replevin, under a power of distress for an annuity granted by G. T. to H. in September 1806. Plaintiff pleaded that in May 1806, G. T., for securing another annuity, and in consideration of 3000*l.*, granted, bargained, sold, and demised the premises in which, &c. to F. for ninety-nine years:

Held, no bar, without alleging entry by F., or that

ERROR. *Green*, the Plaintiff below, declared in replevin for taking goods, and standing wheat, peas, and hops.

Miller, the Defendant below, as bailiff of one *William Hodgson*, made cognizance,

First, that one *John Taylor*, theretofore and before the said time when, &c. was seised of and in the said premises, with the appurtenances in the declaration mentioned, and in which, &c. in his demesne as of fee, and being so seised before the said time when, &c. to wit, on the 10th of *July* 1797, at, &c., duly made and published his last will and testament in writing, bearing date the day and year last aforesaid, and signed by him the said *John Taylor*, and attested and subscribed in the presence of the said *John Taylor* by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things, gave and devised the said premises, in which, &c. with the appurtenances, unto *Charles Haddock* and *George Bythsea*, their heirs and assigns, to hold the same and

F. elected that the deed should enure by way of bargain and sale.

Held, also, that standing crops cannot be taken under a power to distrain for the arrears of an annuity.

every

every part thereof, with the appurtenances, unto the said *Charles Haddock* and *George Bythsea*, their heirs and assigns, to the several uses, upon the several trusts, and to and for the several ends, intents, and purposes in the said will mentioned, expressed, and declared of and concerning the same; that is to say, subject to and charged and chargeable with the payment of the several annuities and legacies thereafter by him given, and to the powers and remedies therein contained for securing the same, to the use and behoof of *George Taylor* and his assigns, for and during the term of his natural life: that the said *John Taylor* afterwards, and before the said time when, &c. to wit, on, &c. died so seised of the said premises in which, &c. with the appurtenances as aforesaid, without altering his said will as to his said devise of the said premises, with the appurtenances; whereupon and whereby the said *George Taylor* then and there became and was seised of the said premises in which, &c. for his natural life; and being so seised, afterwards, and before the said time when, &c. to wit, on the 28th of *September* 1806, at, &c. by a certain indenture then and there made between the said *George Taylor* of the first part, *Wm. Hodgson* of the second part, and one *Thomas Crosse* of the third part, which said indenture, sealed with the seal of the said *G. Taylor*, the Defendant below, brought there into court, the date whereof was the day and year last aforesaid, he, the said *G. Taylor*, for the consideration therein mentioned, did give, grant, and confirm unto the said *W. Hodgson*, his executors, administrators, and assigns, one annuity or clear yearly sum of 166*l.* 2*s.* of lawful money of *Great Britain*, to be charged and chargeable upon, and issuing, payable, had and received, and taken from and out of the said premises, in which, &c., and in the said indenture more particularly described, and from and out of every part and parcel of the same, with their and every

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every of their appurtenances; to have, hold, receive, take, and enjoy the said annuity or yearly sum of 166*l.* 2*s.*, and every part thereof, unto the said *W. Hodgson*, his executors, administrators, and assigns, thenceforth for and during the term of ninety-nine years, if the said *G. Taylor* should so long live; the said annuity or yearly sum of 166*l.* 2*s.* to be payable and paid to the said *W. Hodgson*, his executors, administrators, or assigns, upon the 25th day of *December*, the 25th day of *March*, the 25th day of *June*, and the 25th day of *September* in every year for and during the said term of ninety-nine years, determinable as aforesaid, without any deduction or abatement whatsoever out of the same or any part thereof. And the said *G. Taylor* did thereby also grant unto the said *W. Hodgson*, his executors, administrators, and assigns, that from time to time, when and as often as it should happen that the said annuity or yearly sum of 166*l.* 2*s.* thereby granted, or intended so to be, or any part thereof, should be in arrear and unpaid in the whole or in part by the space of twenty-one days next over and after any one of the days or times wherein the same was thereinbefore appointed to be paid as aforesaid, then and so often and from time to time it should and might be lawful to and for the said *W. Hodgson*, his executors, administrators, and assigns, into and upon the said messuages, lands, or premises thereby charged and made chargeable with the said annuity or yearly sum of 166*l.* 2*s.*, or into or upon any part thereof, to enter, and distrain for the said annuity or yearly sum, and all arrears thereof; and the distress and distresses then and there found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity or yearly sum of 166*l.* 2*s.* thereby granted was a rent reserved upon a lease for years;

years; to the intent that the said *W. Hodgson*, his executors, administrators, or assigns, should and might thereby, therewith, or otherwise be fully satisfied and paid the said annuity or yearly sum of 166*l.* 2*s.* thereby granted, or intended so to be, and all the arrears thereof, and all costs, charges, and expenses to be occasioned by the nonpayment thereof at the days and times thereinbefore appointed for the payment of the same; as by the said indenture, reference being thereunto had, would, among other things, more fully and at large appear. And the Defendant, in fact, said, that afterwards, and during the life of the said *G. Taylor*, to wit, on, &c. at, &c. a large sum of money, to wit, the sum of 539*l.* 16*s.* 6*d.* of the said annuity or yearly sum, for the space of three years and one quarter of a year, ending on, &c. became and was due, and in arrear, and unpaid from the said *G. Taylor* to *W. Hodgson*, and so continued due and in arrear for the space of twenty-one days next over and after the day and year last aforesaid, and from thence until and at the time when, &c. remained and was wholly unpaid, the said *G. Taylor*, at the said time when, &c. being alive, to wit, at, &c.; wherefore he, the said Defendant, as the bailiff of the said *W. Hodgson*, well acknowledged the taking of the said goods and chattels, corn, pulse, and hops, in the declaration mentioned, in the said premises in which, &c. and justly, &c., as, for, and in the name of a distress for the said annuity or yearly sum so due and in arrear to the said *W. Hodgson* as aforesaid, which said annuity or yearly sum still remained due, in arrear, and unpaid; and that he, the said Defendant, was ready to verify. Wherefore, &c.

There was a second cognizance, differing from the first only by the omission of *J. Taylor's* will.

The Plaintiff pleaded in bar, that the said *George Taylor*, before the sealing and delivery of the said indenture

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indenture in the first cognizance mentioned, and before and at the time of making the said indenture therein-after mentioned, to wit, on the 7th of *May* 1806, at, &c., being so seised in his demesne as of freehold for the term of his natural life of and in the said premises in the declaration mentioned, theretofore and before the making of the said indenture in the first cognizance mentioned, to wit, on, &c. at, &c., by a certain indenture made between the said *G. Taylor* of the first part, one *Margaret Watton* the elder, one *Margaret Watton* the younger, one *James Dempster*, and *Daniel Watney*, of the second part; one *Jackson Watton* of the third part, and one *George Fletcher* of the fourth part, after reciting as therein mentioned, in pursuance of the agreement therein mentioned, and in consideration of a certain sum of money, to wit, the sum of 3000*l.*, to the said *G. Taylor* paid by *Jackson Watton*, as agent, as in the said indenture in that behalf was mentioned, did give, grant, and confirm unto *Jackson Watton*, his executors, administrators, and assigns, one annuity or clear yearly sum of 413*l.* 12*s.* of lawful money of *Great Britain*, to be charged and chargeable upon, and issuing, payable, had, received and taken from and out of certain premises in the said last indenture mentioned, and, amongst others, from and out of the said premises in which, &c. in the declaration mentioned, To have, receive, take, and enjoy the said annuity, and every part thereof, unto the said *Jackson Watton*, his executors, administrators, and assigns, from thenceforth for and during the term of ninety-nine years, if the said *G. Taylor* should so long live: In trust nevertheless for the said *Margaret Watton* the elder, *Margaret Watton* the younger, *James Dempster*, and *Daniel Watney* respectively, and their respective executors, administrators, and assigns, as tenants in common in the shares and proportions in the same indenture mentioned.

tioned. And for the better securing the same annuity, for the considerations in the same indenture mentioned, and of 10s. to the said *G. Taylor* paid by the said *George Fletcher*, the said *G. Taylor*, on the nomination and by the direction and appointment and with the privity of the said *Margaret Watton* the elder, *Margaret Watton* the younger, *James Dempster*, and *Daniel Watney*, testified as therein mentioned, did grant, bargain, sell, and demise unto the said *G. Fletcher*, his executors, administrators, and assigns, certain premises in the said indenture particularly mentioned, and, amongst others, the said premises in which, &c. in the declaration mentioned, to have and to hold the same unto the said *G. Fletcher*, his executors, administrators, and assigns, from the day next before the day of the date of the same indenture, for and during and unto the full end and term of ninety-nine years, if the said *G. Taylor* should so long live, without impeachment of waste, as far as the said *G. Taylor* could grant the privilege; upon the trusts in the said indenture expressed and declared, and, amongst others, upon trust that in case and when and as often as the said annuity of 41*l.* 12*s.*, or any quarterly payment thereof, should be in arrear or unpaid, in the whole or in part, by the space of thirty days next after any one of the days or times thereinbefore appointed for payment thereof, the said *G. Fletcher*, his executors, administrators, or assigns, should out of the rents and profits of the said hereditaments and premises thereby granted or demised, or otherwise assured, or intended so to be, or by mortgage or sale thereof, or of a competent part thereof, in case there should not be sufficient distresses on the premises, for all or any part of the said term of ninety-nine years, determinable as therein mentioned, or by bringing actions against or making distress upon all and every or any one or more of the then present or future tenants

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of the said hereditaments and premises, for recovery of the rents in arrear, or by making entries upon the said hereditaments and premises, in and by all and every or any one or more of the said ways and means, or by any other lawful and reasonable ways and means whatsoever, levy and raise such arrears of the said annuity of 41*l.* 12*s.* as from time to time should become due and remain unpaid, together with all such damage, costs, charges, and expenses as the said *Jackson Watton*, his executors, administrators, or assigns, should incur, expend, or be put unto by reason of the nonpayment of the said annuity of 41*l.* 12*s.*, or any part thereof, together with the costs, charges, and expenses attending the execution of the said term of ninety-nine years, and the annual or other premiums which should become due and payable for keeping on foot the benefit of any policy or policies of insurance on the said premises thereby demised, or any part thereof, in the sum of 4000*l.* from loss or damage by fire, or obtaining any new or other policy or instrument of insurance for the same or the like amount. The Plaintiff then averred that the same indenture and the term of ninety-nine years thereby created and granted of and in the said premises in which, &c. in the declaration mentioned, at the time of the making of the said indenture in the said cognizance mentioned, and from thence continually until and at the same time when, &c. in the said declaration mentioned, and from thence continually hitherto, had been and were in full force and effect. And the Plaintiff further said, that upwards of thirty days before the making of the said distress, and until and at the time of the making of the said distress, there was due and owing under and by virtue of the said indenture of the 7th of *May* 1806 aforesaid a large sum of money, to wit, the sum of 2000*l.*, which had become and was due for and on account of the said annuity, theretofore, to wit,

wit; on the 7th of *May* 1829, due and payable; and that he, the Plaintiff, was ready to verify. Wherefore, &c.

A similar plea was pleaded to the second cognizance. Demurrer and joinder; upon which

The Court of King's Bench, after argument, gave judgment for the Plaintiff below.

Upon error to this Court, the case was argued in *Trinity* term last, by

Erskine for the Defendant below. The objection to the distress made by the Defendant below is, that, before the grant of the annuity and power of distress to *Hodgson*, the interest in the premises on which the distress was made was vested in *Fletcher* by the deed of demise or bargain and sale; and that, at all events, the power of distress does not warrant the seizure of standing crops.

In order, however, to take advantage of the conveyance to *Fletcher*, the Plaintiff should have shewn affirmatively that he took under *Fletcher*, that being a matter peculiarly within his own knowledge: *Com. Dig. Pleader*, C. 81. No such allegation is to be found on the record, and in the absence of such allegation it must be inferred from the grant of the power of distress that the grantor was in possession. *Chatfield v. Parker.* (a)

But the conveyance to *Fletcher* operated as a demise at common law; and if so, the legal estate remained in *Taylor* for want of entry on the part of *Fletcher*, who till entry had only an *interesse termini*, but no estate. *Littleton* says, s. 58., "When the lessee entereth by force of the lease he is tenant for years;" and Lord Coke observes, (*Co. Litt.* 46 b.) "True it is, he is not tenant for many purposes till he enters." Until entry,

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(a) 8 B. & C. 543.

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there is no severance of the possession from the reversion, and no portion of the estate is out of the lessor, *Bac. Abr. Leases*.

It is true, the conveyance to *Fletcher* contains the words *bargain* and *sale* as well as the word *demise*. But the deed must operate according to the intention of the parties; *Fox's case* (a), *Roach v. Wadham*. (b) There is a statement of trusts, a power of suing and distraining, and an averment of arrears of the annuity for which *Fletcher* might have entered, which shew an intention to pass a term by demise; he is nowhere alleged to have elected as he might have done, *Heyward's case* (c), that the deed should operate as a bargain and sale under the statute of uses; and, in the absence of any such election, it must be taken to operate at common law: *Dayrell v. Gunter* (d); *Wynne v. Griffith* (e); admitted in argument, 2 *Sand. Uses*, 49.; *Gilb. Uses*, 230. Even if the deed took effect under the statute of uses, as the grantor of the annuity had a right to grant a power of distress against himself, and as there is nothing on the record to rebut the presumption that the grantor was in possession at the time of the grant to *Hodgson*, it was for the Plaintiff to shew that he was in under *Fletcher*, or by some title incompatible with *Hodgson's*: *Howell v. Bell* (g), *Lutw.* 1227. The goods of the grantor, and of those claiming under him, were clearly distrainable: *Com. Dig. Distr. B. 2.*; so, their cattle levant and couchant, *Vin. Abr. Distr. I. 34. O. 5. 7.* And the Court is not to assume that the goods are the goods of a stranger; it is for the Plaintiff to plead it, if the fact be so: *Bac. Abr. Replev. K.*

Then, the Defendant below was entitled to distrain

(a) 8 *Rep.* 94.(b) 6 *East*, 289.(c) 2 *Rep.* 35.(d) *Sir W. Jones*, 206.(e) 2 *Roll. Abr.* 787. pl. 6.(g) 3 *Salk.* 136. 1 *Ld. Raym.* 172.

the standing crops. It is true, the statute 11 G. 2. c. 19. does not expressly enable the grantee of a rent-charge to make such a distress; but the deed from *Taylor* expressly empowers *Hodgson* to distrain and dispose of his distress in the same way as a distress for a rent reserved upon a lease for years. It is not open, however, to the Plaintiff to take the objection in this form of action. If the standing crops were not proper objects of distress, he should have sued in trespass. Replevin only lies in respect of matters which may properly be the subject of distress, but the right to distrain which in the particular instance is contested, *Bac. Abr. Replevin, F. Co. Litt. 145 b.*

At all events, the cognizance is divisible, and the Defendant may have judgment for the part properly taken.

Preston contra. A sufficient interest passed to *Fletcher* under the deed of May 7. 1806, to preclude *Taylor* from granting a subsequent right of distress as against any but himself, and those claiming under him. Great inconvenience and confusion will ensue, if terms which are universally granted as a security for money lent shall be held insufficient for that purpose unless accompanied with the ceremony of actual entry; a relic of feudal usages incompatible with modern habits of business, and not required for any useful purpose.

The lessee, before entry, has title sufficient to exclude any subsequent claimant. And though he cannot recover in ejectment and trespass for mesne profits (a), he is subject to all the liabilities of his contract. At all events, by way of bargain and sale, the deed of May 7. 1806 conferred complete title on *Fletcher*; for it is not for *Hodgson*, a subsequent grantee, to elect for *Fletcher* whether his deed shall operate under the statute of uses

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or at common law: it must be taken to operate in the way which will most certainly effect the intention of the grantor.

If so, the subsequent grant to *Hodgson* could only operate against *Taylor*, and those claiming under him, by way of estoppel; and it is for the Defendant to shew that the Plaintiff is affected by that estoppel. The deed to *Fletcher* is *prima facie* an answer to the cognizance; and it was for the Defendant to reply an estoppel if he could, not for the Plaintiff to shew in the first instance that he was not estopped.

At all events the Defendant could not distrain the standing crops; for though the deed to *Hodgson* enables him to *dispose* of the distress, as a distress for rent reserved upon a lease for years, it does not authorize him to *distrain* otherwise than as a grantee of a rent-charge.

The Court requested that an application might be made to the Court of King's Bench to amend the record, by inserting an averment that *Fletcher* entered by virtue of the demise; which application having been made and rejected, the judgment of the Court was now delivered by

TINDAL C. J. This was an action of replevin for taking certain goods and certain standing crops of *Green*, the Plaintiff below, in which action *Miller*, the Defendant below, made cognizance as bailiff of one *William Hodgson*: and in his first cognizance, which differs from the second only in deducing the title of *George Taylor* from the owner of the fee, stated, that the said *George Taylor*, being seised for life, by an indenture dated the 25th of *September* 1806, granted to the said *Hodgson* an annuity of 166*l.* 2*s.* out of the premises in which, &c. for the term of ninety-nine years, if *Taylor* should so long live, payable in the manner therein mentioned; with
a clause,

a clause, that if the same should be in arrear for twenty-one days, it should be lawful for *Hodgson* to enter on the said premises and distrain for the arrears, "and the distresses there found to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rents reserved upon leases for years might, were, and ought to be detained, managed, sold, and disposed of, and as if the said annuity was a rent reserved upon a lease for years."

The cognizance then stated that arrears of the said annuity for three years and a half, viz. the sum of 539*l.* 10*s.*, had become due from *Taylor*, and had continued so due for more than twenty-one days; and justified the taking and detaining the goods as a distress for such arrears.

To this cognizance the Plaintiff below pleads in bar, that before the making of the indenture stated in the cognizance, viz. on the 7th of *May* 1806, the said *George Taylor* being seised for the term of life, by another indenture then made between himself of the first part, the persons therein mentioned of the second part, one *Jackson Walton* of the third part, and one *Fletcher* of the fourth part, in consideration of the sum of 3000*l.* to *Taylor*, paid by *Jackson Walton*, granted to the said *Walton* an annuity of 41*l.* 12*s.* out of the said premises in which, &c. for ninety-nine years, if *Taylor* should so long live. And for the better securing the said annuity, for the considerations in the said indenture mentioned, and of 10*s.* paid to *Taylor* by *Fletcher*, the said *Taylor* granted, bargained, sold, and demised to the said *Fletcher* the said premises in which, &c. for ninety-nine years, if the said *Taylor* should so long live, upon trust that as often as the said last-mentioned annuity of 41*l.* 12*s.*, or any quarterly payment thereof, should be in arrear for thirty days, *Fletcher* should, out of the rents and profits of the said premises, or by mortgage, in case there should not be sufficient distresses, or by making entries, levy such arrears and damages.

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The plea in bar then proceeds to allege, that the said indenture, "and the term of ninety-nine years thereby granted, were in full force and effect;" and that, upwards of thirty days before the making of the distress, there was due and owing, by virtue of the said indenture of the 7th of *May*, the sum of 2000*l.* for arrears of the said annuity.

A similar plea in bar was pleaded to the second cognizance.

To these pleas in bar there was a general demurrer and joinder. And, after argument, the Court of King's Bench gave judgment for the Plaintiff below for his damages and costs.

Upon this judgment a writ of error has been brought; and after argument, and time taken to consider, the Court of error is of opinion that the judgment of the Court below ought to be reversed.

The argument in this case has turned upon the legal operation and effect of the demise from *Taylor* to *Fletcher*, contained in the indenture of the 7th of *May* 1806. For, if such demise created a legal estate in *Fletcher*, the grant of the annuity by *Taylor* to *Hodgson* by the subsequent deed of the 25th of *September* 1806, but during the continuance of *Fletcher's* interest, must be altogether inoperative in creating any charge upon the premises.

Now, in order to give an estate to *Fletcher*, it is contended by the Plaintiff below, that the grant must either be considered as a demise at common law, or as a bargain and sale made upon a consideration of money, and operating under the statute of uses; in either of which cases the estate vests in *Fletcher*, the grantee.

The first question, therefore, is, whether the grant can be considered as a lease at common law. The objection taken to it as a lease at common law is this, that it does not appear upon the pleadings that *Fletcher* the lessee, or any person claiming under him, entered
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after the lease was granted, and that unless there is an entry by the lessee, or some one claiming under him, no estate vests in him. And such we consider to be the effect of the authorities. It is laid down in *Co. Litt.* 46 b., "That to many purposes the lessee is not tenant until he enters, as a release made to him is not good to him to increase his estate before entry, — neither can the lessor grant away the reversion by the name of the reversion before entry." Now both these consequences depend upon the assumption that the estate has not passed out of the lessor into the lessee, before he has by his entry accepted such estate; for, if the estate had actually passed to and vested in him, there can be no reason why a release would not increase such estate, nor, again, why the reversion should not pass by that name. And in further support of the distinction, Lord *Coke* goes on to say, "but the lessee before entry hath an interest, *interesse termini*, grantable to another;" thus putting in contradistinction the interest and the estate of the lessee. And again *Littleton*, s. 459., lays down the same doctrine more pointedly. "If the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void; for that the lessee had not possession in the land at the time of the release made, *but only a right to have the same land by force of the lease.*" See also *Bacon's Abridgment*, tit. *Leases*, M., where the necessity of an entry by the lessee, in order that the estate may vest in him, is put upon the ground that it is an acceptance by him of the estate. Under these authorities, therefore, we think that, as the Plaintiff neither alleged an entry by *Fletcher* under the lease, nor shews any privity between his possession and *Fletcher's* term, nor any thing equivalent to an entry, such as an acceptance of the estate by the execution of the lease, no estate passed to *Fletcher* under

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under the lease of the 7th of *May*; and, consequently, that the estate remained in the lessor, and that the grant of the annuity, and the power of distress to *Hodgson* by the indenture of the 25th of *September*, was a grant capable of taking effect.

But it is contended by the Plaintiff below, that if the grant of the 7th of *May* cannot take effect as a lease at common law, at all events it is good to pass the estate to *Fletcher* as a bargain and sale under the operation of the statute of uses.

It is undoubtedly true, that where a deed may enture to divers purposes, he to whom the deed is made shall have election which way to take it, and may take it in that way as shall be most for his advantage (*Sheph. Touchst.* 83.); and therefore if a man for money demises, grants, bargains, and sells to *J. S.* his land for years, *J. S.* has election to take it, either by demise at the common law, or by bargain and sale, *Heyward's case* (a): so that *Fletcher* in this case, or any person claiming under *Fletcher*, and in privity with him, might at any time elect to claim under the deed which way they would. But the Plaintiff below who pleads this grant is, so far as appears upon the record, a stranger to it; and therefore the Plaintiff below is not competent to elect for *Fletcher*, whether the grant to him shall operate the one way or the other; nor indeed does the Plaintiff shew that any election has been made by any one that the deed shall be held to operate under the statute. It is not even stated, as was before observed, that *Fletcher* ever executed the deed, so as to assent to take any estate under it: for any thing that appears to the contrary, he is as much a stranger to it as *Green* the Plaintiff below. Under these circumstances, we consider the Court cannot be called upon to exercise an election for

(a) 2 Rep. 35 b.

the grantee, at the request of a stranger, for the purpose of defeating a subsequent grant of an annuity for a valuable consideration. The grant, therefore, must be left to such operation as it will have as a lease at common law, which, we have already seen, will not be sufficient to create an estate in the lessee for want of an entry; and we therefore think the term of years set up under that grant forms no answer to the cognizance under the subsequent annuity deed.

Although, however, the Defendant below had the right to distrain for the arrears of his rent-charge, yet, upon the due consideration of the power of distress contained in the deed, we think it did not extend to the growing and standing crops which have been taken under it. At common law it is well known the distresses taken for rent arrear were not saleable, but could only be kept as a pledge for the rent. But by the stat. 2 *W. & M.* goods and chattels distrained for rent due under a contract may be kept and sold in the manner pointed out by that statute.

It was not until the 11 *G. 2. c. 19.* that landlords had power to distrain corn, grain, or other produce growing on the land demised. The grantee of the rent-charge is empowered by the deed to detain, manage, sell, and dispose of the distresses in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years; and we think these words are fully satisfied by holding them to grant the powers which were given to landlords under the stat. *W. & M.*, without extending them to the new subject of distress first granted by the statute of *Geo. 2.* A power like the present ought at all times to be construed strictly, and more especially when it is sought to bring within it the growing crops of a person who is a stranger to the deed.

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Upon the whole, therefore, we think that the present judgment should be several, and that judgment should be entered for the person making cognizance for a return of the cattle, goods, and chattels which were taken in distress, and for that part of the distress only; with a judgment for the Plaintiff for damages for taking and detaining the standing crops.

Judgment reversed.

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Defendant executed, 28th of February

1824, a policy of assurance on freight from *Singapore* to *Europe*, with liberty to sail to, touch, and stay at, any places whatsoever, to load, unload, reload, and for all necessary purposes whatever. The ship sailed from *London* in *September* 1823, and having been detained by the captain for his own purposes at *Van Dieman's Land*, did not arrive at *Singapore* till the 30th of *March* 1825; she sailed thence on the voyage insured the 3d of *May* 1825:

ASSUMPSIT on a policy of insurance on ship *Aquila*, at and from *Singapore* and *Batavia*, both or either, to the ship's port of discharge in *Europe*, with liberty to sail to, touch, and stay at any ports and places whatsoever and wheresoever, particularly at the *Cape of Good Hope*, *St. Helena*, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever. The policy was declared to be on freight, and valued, and a loss was averred by perils of the sea on the voyage from *Singapore* to *London*.

By a special verdict it was found that the policy of insurance was made and entered into between the Plaintiff and the Defendant, on the 28th of *February* 1824; that the ship sailed from *England* in the beginning of *September* 1823, having on board thereof divers passengers and goods, bound for and deliverable at the *Cape of Good Hope*, *Van Dieman's Land*, and

held, that by so long a postponement of the risk the Defendant was discharged, a jury having found the delay unreasonable.

Sydney,

Sydney, New Holland, and was under the command of *Joseph Thomas Watson*, the master thereof; that by charterparty, dated the 26th of *May 1823*, the ship, after discharging her cargo at *New Holland*, was to proceed to *Singapore*, and from thence to *Malacca* and *Penang*, both or either, or to *Batavia* only, to take on board a cargo for *Europe*, on account of the freighters; and that before the ship sailed from *England* as aforesaid, the Plaintiff caused instructions to be delivered to the said *J. T. Watson*, the master of the said ship, of which the following was a copy:—

“ You having the command of the ship *Aquila*, bound on a voyage to the *Cape of Good Hope*, *Van Dieman's Land*, and *New South Wales*, and from thence to *Singapore* and other ports of lading as per charterparty, and having shipped twenty-four hogsheads of stout and a quantity of deals, consigned to yourself for sale on my account, — copy of invoice at back of this, — you will please dispose of them to the best account, taking care not to leave them behind you unsold. As you have a small quantity of goods to deliver at the *Cape*, should you be able to procure any goods and passengers from that place to *New Holland*, &c., to the amount of not less than from 300*l.* to 400*l.*, and at the same time to be able to dispose of my investment at about the invoice price, by detaining the ship not more than ten days, you will use your own discretion, but think it will answer your purpose so to do. On your arrival at *Van Dieman's Land*, as you will have a very considerable sum of money to receive as freight and passage money, beg your particular attention to the same. You will please to caulk the half deck and between decks as soon as convenient, fearing any leak might damage the cargo stowed below; and think the less water there is used for washing below the better, fearing the consequences above stated.

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After leaving *Van Diemen's Land* you will proceed to *New Holland*, making every exertion in your power at that port to enable you to proceed to *Sincapore*, at which port hope and trust you will be fully loaded; and on your arrival at said port or ports you will give the earliest information to commence your lay days; and let me beg of you to make all the interest you can with the merchants for heavy goods, to extend from 200 to 300 tons, your ship requiring a large proportion, and will prove a great advantage in point of freight; and as you are not likely to get many passengers home, and should suppose you will have a large proportion of light goods, you will make the best you can with your accommodation, and, if necessary, take down the aft bulk heads, but the after cabin would advise you not to disturb; — proportion of cabin freight you will of course be entitled to. Shall be happy to hear from you at every convenient opportunity, at sea or in port.

*Richard Mount.*¹³

The ship arrived at the *Cape of Good Hope* on the 3d of *December* 1823, and sailed the 24th of the same month.

On the second day after the ship anchored at the *Cape of Good Hope*, part of her cargo belonging to the said *J. T. Watson* was discharged. At the time of making the said policy of insurance the ship was at *Hobart Town, Van Diemen's Land*, having arrived there on the 4th of *February* 1824. Part of the outward cargo of the ship and three of the passengers were landed at *Hobart Town*, and some delay was occasioned at *Hobart Town* by the difficulty in getting at different parts of the cargo. The ship sailed from *Hobart Town* on the 27th of *March* 1824, arrived at *George Town, Port Dalrymple*, in *Van Diemen's Land*, on the 6th day of *April* 1824,

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1824, and there landed others of the said passengers, and other parts of the cargo. The said passengers and cargo were necessarily conveyed by the boats of the ship a distance of forty miles from the ship up the river there. The ship sailed from *George Town* for *Sydney, New Holland*, on the 29th of *July* 1824; arrived at *Sydney* on the 5th of *August* 1824; there landed the remainder of her passengers, and of her said outward cargo, and sailed from *Sydney* on the 18th of *November* in the same year for *Singapore*. She met with very bad weather; was twice driven back; once to *Sydney* and once to *Hobart Town*; and arrived at *Singapore* on the 30th of *March* 1825, where the risk intended to be insured by the said policy was to commence. She sailed from *Singapore* on the voyage intended to be insured on the 3d of *May* 1825; arrived at *Penang* on the 17th of *May* in the same year, and remained there until the 23d of *June* in the same year, when she proceeded on her voyage towards *London*.

At the time when the risk by the policy intended to be insured against, was to commence, the ship was well and sufficiently manned, and in all respects seaworthy. And whilst she was proceeding upon the voyage in the policy mentioned, and during the continuance of the risk intended to be insured against thereby, she was by the perils of the sea wholly lost, as in the declaration was alleged.

It was then found that the said *J. T. Watson*, master of the ship, after his arrival at *Hobart Town* as aforesaid, was ashore, and came on board the ship frequently, and was building a house upon some land belonging to him there. That the said *J. T. Watson* also, whilst at *Hobart Town*, purchased a schooner, which he fitted out and sent to sea on a sealing voyage in the early part of *April* 1824. That the said schooner was fitted out from the stores of the ship *Aquila*, was partly manned with mariners,

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mariners, part of her crew, was commanded by the chief mate of the *Aquila*, and was absent about two months. That the said schooner returned from the sealing voyage on which she had been despatched, and was again sent upon a second sealing voyage. That the said schooner had not returned from her second sealing voyage before the *Aquila* left *Sydney* on the 18th of *November* 1824; and the said mate and the crew of the schooner never again found the *Aquila*. That there was unreasonable and unjustifiable delay between the making of the policy of insurance and the commencement of the risk intended to be insured against as aforesaid. That the Plaintiff was, at the time of the making of the said policy of insurance, and continually, until and at the time of the loss of the ship as aforesaid, interested in the same to the amount of the sum insured thereon as aforesaid.

The case was argued in *Trinity* term.

Taddy Serjt. for the Plaintiff. The question is, whether, upon a policy such as the present, there is any implied warranty that the ship shall sail from the port where the risk is to commence, within any certain time; for the assured is not bound by a mere representation without fraud. *Bize v. Fletcher* (a), *Pawson v. Barnevelt*. (b) The general rule is, that if the insurer wishes to confine the risk, he must state on the policy the time within which he proposes the voyage shall commence. *Emerigon* (vol. ii. c. 13. s. 2. p. 16.) states the following case: — “*Les sieurs Garnier, Mallet, et Dumas, de Cadix, s'étaient rendus assureurs sur le corps du vaisseau Nostra Senora Oranzaza, capitaine Joseph Ventura, de sortie de Cadix jusqu'à Cumana, et de retour à Cadix. Le 19 Decembre 1752, ils se firent réassurer*

(a) *Dougl.* 288.

(b) *Dougl.* 12. in not.

à Mar-

à *Marsaille* 18,000 liv. avec clause qu'en cas de perte ils ne seraient tenus de produire d'autre sorte d'écriture que le seul acquit du paiement qu'ils en auraient fait au premiers assurés. Ce navire arriva heureusement à *Cumana*, dans l'*Amérique Méridionale*. Il y fit un long séjour. En 1756 *Garnier*, *Mallet*, et *Dumas*, se pourvurent au consulat de *Cadix*, en résiliation du risque, attendu le trop long séjour que le navire faisait à *Cumana*; ils furent déboutés de leur requête. Enfin, ils apprirent que le navire était devenu innavigable à *Cumana*. Cet accident fut notifié aux réassureurs de *Marseille*, par exploit du 2 *Juin* 1761.

“ Le consulat de *Cadix* condamna *Garnier*, *Mallet*, et *Dumas* à payer la perte. Ils la payèrent par quittance du 26 *Avril* 1762. Le 4 *Septembre* suivant, les sieurs *Kick* et *Durantet*, porteurs de la police de réassurance, se pourvurent contre les réassureurs, et communiquèrent la quittance dont je viens de parler.

“ Les réassureurs opposaient que le risque s'étoit évanoui par le laps de dix années; et qu'un navire qu'on laisse croupir pendant si long-tems dans un port ne peut que devenir innavigable.

“ Sentence du 26 *Juin* 1764, qui régla la cause à droit sur le fond et principal, et qui condamna les réassureurs au paiement provisoire des sommes réassurées. Ceux-ci appelèrent de cet sentence au chef du provisoire. Ils obtinrent un décret de surséance. Arrêt du 26 *Juin* 1765, au rapport de M. de *Fortis*, qui révoqua le décret de surséance, et qui confirma la sentence, avec amende et dépens. Ensuite de cet arrêt, tous les réassureurs, à l'exception de B., qui avait fait faillite, payèrent les sommes par eux réassurées, en principal, intérêts et dépens, et renoncèrent à la poursuite du fond.

“ Seconde sentence rendue le 15 *Novembre* 1766, qui condamna les administrateurs de la faillite de B. à payer définitivement la somme de 2000 liv. par lui

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souscrite, et qui les y condamna sous l'hypothèque du 12 *Décembre* 1752, jour de la réassurance reçue par courtier. Cette dernière sentence fut acquiescée."

Upon which he observes, "On ne saurait disconvenir que les réassureurs étaient non recevables à contester le remboursement d'une perte payée par les premiers assureurs, dont ils étaient garans. Mais il paraît dur qu'un navire devenu innavigable dans un port lointain, où on la laissoit oisif pendant plusieurs années, soit à la charge des assureurs. Cependant, s'il n'y a aucune fraude de la parte des assureurs assurées, la règle générale est pour ceux-ci. La loi n'a établi sur ce point aucun délai fatal; et les assureurs doivent s'imputer de n'avoir pas *limité le tems* de l'assurance. Car si la police renferme quelque pacte particulier, au sujet de tout ce que dessus, il faut s'y tenir."

And this is the rule of the law of *England*. In *Beckwith v. Sidebotham* (a) it was held, that if the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo, that letter need not be communicated to the underwriters in effecting a policy of insurance upon her, at and from the foreign port to a port in *England*, unless information on the subject be particularly called for. And Lord *Ellenborough* said, "that if it was necessary to have disclosed this letter as governing the time when the ship would sail, it would in all cases be necessary to inform the underwriters where any repairs were wanting, and he believed it very frequently happened, that a ship must have something done to her before she would sail on her homeward-bound voyage. If the underwriters wish

(a) 1 *Campb.* 118.

to have particular information upon this subject, they ought to ask for it ; and if they were disposed only to insure a voyage made during a particular season of the year, they should (as was commonly done with *Jamaica* ships) insert a warranty in the policy that the ship shall sail on or before a certain day."

Emerigon states another case in the same page : " En 1753, un négociant s'était fait assurer *in quovis*, 8000 liv., en espèces d'or et d'argent qu'il attendait de *Buenos Aires*. En 1764, les assureurs requièrent que les risques fussent déclarés finis. L'assuré soutenait que ses fonds n'étaient pas encore arrivés, et que la police ne renfermait aucune terme. Sentence de l'Amirauté de *Paris*, qui déchargea les assureurs, sur le fondement que les risques ne doivent pas être éternels, et que onze ans d'attente doivent suffire."

But there the insurers applied to the Court under a peculiar law to end the risk. Independently of such an application, *Emerigon* says (p. 18.), that nothing will discharge them but the contract coming to an end : not even the change from peace to war. The same law is laid down by *Potier* (*Contrat d'Assurance*, pl. 63. s. 2. c. 1. p. 102.) — " Que si le tems qui doivent durer les risques des retours qu'on fait assurer n'était pas limité *arbitrio judicis*, les assureurs seraient exposés à être trompés tous les jours ; car la rentrée de ces retours étant le plus souvent inconnue aux assureurs, un négociant de mauvaise foi, apres avoir reçu en entier les retours qu'il a fait assurer, pourrait long tems après faire valoir l'assurance sur des marchandises qu'il aurait perdues, en disant, contre la vérité, qu'elles font partie des retours qu'il a fait assurer."

Here the jury have not found that there was fraud ; that the Plaintiff was accessory to the delay ; or that the delay has increased the risk. There is nothing here to determine the contract but the assumption, that the

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vessel did not arrive at *Sincapore* in reasonable time. What is reasonable time ought to be determined, not by the jury, but by the Court; and how can the Court determine, when the insurer has engaged to insure from *Sincapore*, without stipulation for any time by which the vessel should arrive at that port? The Court cannot interpolate a warranty, which the insurer has not thought fit to require.

Spankie Serjt. contra.

It is an implied condition in every contract of assurance, that the assured shall begin his voyage within a reasonable time, otherwise the insurer might never be exonerated from his risk; and if his risks do not regularly evolve, how is he to calculate his funds and conduct his business? *Emerigon*, c. 1. s. 3., lays it down, “La condition dépend de l’expédition maritime plutôt que de la volonté de l’assuré;” and in c. 13. s. 9., “Si le voyage est autre que celui qui a été assuré l’assurance reste caduque.”

The application to the Court, under the law of *France*, to end the risk, proceeds on this principle; the *arbitrium judicis* supplying the place of the finding of the jury here as to what shall be a reasonable time; *Potier*, pl. 63. c. 1. s. 2.; a question which cannot be determined in any other way when there is no express stipulation on the subject.

Emerigon (c. 13. s. 10.) discusses the lawfulness of undertaking another voyage pending the insurance. After citing two old cases in which it had been decided by the *French* Courts that such voyage *might* lawfully be undertaken, he observes: “Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que si, avant que le voyage assurée soit commencé, le capitaine en entreprenne un autre, l’assurance

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surance est nulle, et la prime doit être restituée." To commence the voyage insured within a reasonable time is, therefore, a condition in the contract; and all conditions, for the performance of which no time is specified, must be performed within a reasonable time. *Co. Lit.* 208 a. *Bothy's case (a)*, 5 *Vin. Abr. Condit. (C. b.)* pl. 11. A principle which pervades the whole of the law. Promises of marriage, notices of dishonour, and notices of abandonment, must be all attended to within a reasonable time; and what is a reasonable time is a question for the jury, subject to the direction of the Judge. *Anderson v. Royal Exchange Assurance Company. (b)* So when goods do not correspond with sample, they must be returned within a reasonable time. *Parker v. Palmer. (c)*

In *Ougier v. Jennings (d)*, where the question was, whether by usage, ships in the *Newfoundland* trade might make intermediate voyages before the policy attached, Lord Eldon said, "If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect. If several ships belonging to a merchant arrive together at *Newfoundland*, and finding cargoes for some only, he *bond fide* sends the rest on an intermediate voyage, it seems reasonable." Thus putting it altogether upon the reasonableness of the time employed. And *Vallance v. Dewar (e)* proceeded on the ground that this usage was generally known. In *Hull v. Cooper (g)* it was held, that if a ship be insured at and from a certain place, where, in fact, she was not at the time, but arrived there after some interval, (but the fact was not communicated to the underwriters, who did not call for information on the

(a) 6 *Rep.* 31.

(b) 7 *East*, 38.

(c) 4 *B. & A.* 389.

(d) 1 *Campb.* 505. note.

(e) 1 *Campb.* 503.

(g) 14 *East*, 479.

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subject,) it was a question for the jury, whether the delay which intervened materially varied the risk.

In *Smith v. Surridge* (a) Lord Kenyon said, "that if there was a voluntary delay on the part of the plaintiff, there was no doubt it would avoid the policy. And in *Hartly v. Buggin* (b) Lord Mansfield considered delay as a quasi deviation, because it places the underwriter in a different position. *Beckwith v. Sidebotham* turned only on the necessity of a certain communication, and does not affect the present question.

Taddy. Hartly v. Buggin, Driscoll v. Pasmore (c), *Smith v. Surridge, Ougier v. Jennings*, and *Vallance v. Dewar*, are cases either of deviation, or of alleged delay after the commencement of the risk, and do not apply where the question is, whether delay before the risk attaches, will avoid the contract. But in *Hull v. Cooper*, as in *Beckwith v. Sidebotham*, Lord Ellenborough decides that it rests with the insurer to ascertain or fix when the risk shall commence.

The authorities to shew that a condition must be performed within a reasonable time are equally inapplicable, for the question here is, whether the condition exists in the contract, and if not, whether the Court can interpolate it. *Emerigon* in discussing the question of an intermediate voyage, only proposes to shew that the insurance must be confined to the voyage contracted for: the period at which the risk is to commence must be left to the parties contracting, and ought not to be fixed by the interposition of a court. Time is not of the essence of the policy, and the insurer may always protect himself by enquiry and stipulation. Besides, the delay here, was on the outward voyage, with the conduct of which the underwriter had no concern.

Cur. adv. vult.

(a) 4 *Esp.* 25.

(b) 1 *Park Ins.* 513.

(c) 1 *B. & P.* 200.

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TINDAL C. J. This was the case of an action brought upon a policy made at *London* on the 28th of *February* 1824, upon the ship *Aquila*, "at and from *Sincapore* and *Batavia*, both or either, to the ship's port or ports of discharge in *Europe*, not to the northward of *Hamburg*, with liberty to call at *Cowes* for orders." A liberty was also given in the policy "to sail to, touch and stay at any ports or places whatsoever and where-soever, particularly at the *Cape of Good Hope*, *St. Helena*, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever." The policy was declared to be on freight, and the freight, valued. The declaration then stated a total loss of the ship while proceeding on the voyage from *Sincapore* to *London*, being the voyage mentioned in the policy, by the perils of the sea, whereby the freight became wholly lost to the Plaintiff.

Upon the trial of the cause the jury found a special verdict, of which the only facts material for the consideration of the question which has been argued before the Court, are the following:—That the policy was made on the 28th of *February* 1824, at which time the ship was at *Hobart's Town*, *Van Diemen's Land*. That the ship sailed from *England* in the beginning of *September* 1823 under a charterparty, by which the ship, after discharging her cargo at *New Holland*, was to proceed to *Sincapore*, from thence to *Malacca* and *Penang*, both or either, or to *Batavia* only, to take on board a cargo for *Europe*. The special verdict, after stating the course of the ship's voyage from *England* to the *Cape of Good Hope*, to *Hobart's Town*, to *George Town* in *Van Diemen's Land*, and to *Sydney* in *New Holland*, found that she arrived at *Sincapore* on the 30th of *March* 1825, where the risk intended to be insured against was to commence. It then stated the sailing
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on the voyage homeward, and the total loss. And after setting out many particular instances of delay in the course of the voyage on the part of the captain, there is an express finding by the jury, "That there was unreasonable and unjustifiable delay between the making of this said policy of insurance and the commencement of the risk intended to be insured against."

Upon this special verdict it has been argued before us on the part of Defendant, that the unreasonable and unjustifiable delay on the part of the captain in completing the outward voyage on which he was then engaged, and commencing the homeward voyage on which the risk was intended to attach, discharged the underwriters from this policy; and we are of opinion that such unreasonable and unjustifiable delay on the part of the insured, in commencing the voyage insured against, is in the nature of a deviation, and does amount to such an alteration of the risk insured against, as to discharge the liability of the underwriters upon this policy.

That an unreasonable delay in commencing the voyage insured against, after the policy has actually attached, discharges the underwriter from the policy, appears, not only from the reason of the thing itself, but from the opinion of Lord Kenyon in *Smith v. Surridge*. (a) In that case, the ship *Resolution* being insured "at and from *Peters to London*," it was proved she remained a considerable time at *Peters* to complete her repairs before she commenced her voyage. An objection was taken, that such delay avoided the policy; and Lord Kenyon said, "If there was any unreasonable delay on the part of the insured, there was no doubt it would avoid the policy;" though he afterwards observed, "the delay in that case was not a voluntary delay, nor such as amounted to a discharge of the policy."

(a) 4 Esp. 25.

Again,

Again, that an unreasonable delay in performing the voyage insured is equivalent to a deviation, was expressly ruled in the case of *Hartley v. Buggin* (a), where a ship, insured "at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves," stayed several months beyond the usual stay of ships in that trade. The Court of King's Bench decided, this was equivalent to a deviation. And Lord Mansfield said, "The single point before the Court is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied, no matter whether the risk has or has not been thereby increased."

The same principle is admitted in the cases of *Valance v. Dewar* (b), and *Ougier v. Jennings*, in a note to that case; in both of which it is admitted, that a delay in the commencement of the risk, by the interposition of an intermediate voyage not communicated to the underwriters, would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters.

In the present case, at the time the policy was effected, the ship was then actually in the course of performing her outward voyage under her charter, and the risk upon the policy was not to commence until the outward voyage was completed by the arrival of the ship at *Singapore*. And it is argued by the assured, that although unjustifiable delay before commencing, or in performing the voyage itself which is insured, amounts to a deviation, no such delay in completing the outward voyage upon which the ship is then known to be engaged, will have the same consequences, inasmuch as with that voyage the policy in question has no concern.

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(a) *Mich.* 11 G. 3. *Park.* 513.

(b) 1 *Camp.* 305.

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But if the principle above laid down be sound, where the delay takes place *after* the risk has actually commenced, in reason and sense it applies also to the case of the voyage insured, where the risk is *not to commence* until the completion of the outward voyage.

The reason upon which a deviation discharges the insurer, is not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself. It must be admitted that, if the policy had been effected upon this ship at and from *Sincapore*, the ship then being at *Sincapore*, unreasonable and unjustifiable delay at *Sincapore* would have avoided the policy. Why, but because the voyage, commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected.

But what is the difference with respect to the alteration of the voyage, whether this unreasonable and unjustifiable delay takes place in the course of the ship's voyage to *Sincapore*, or *after* the ship is at *Sincapore*? The underwriter has as much right to calculate upon the outward voyage, on which the ship is then engaged, being performed in a reasonable time, and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time, after the risk has attached. In either case the effect is the same, as to the underwriter, who has another risk substituted instead of that which he has insured against; and in both cases, the alteration

alteration is occasioned by the wrongful act of the assured himself.

But the principle contended for by the Defendant seems to be established as law by the case of *Hull v. Cooper*. (a) In that case, Lord *Ellenborough* says, "When a broker proposes a policy to an underwriter, on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there." In that case, the question turned upon the point of concealment, the situation and circumstances of the ship being known to the assured, but not communicated to the underwriter. In the present case, it is true, no such question can arise, the assured, at the time the policy was effected, being ignorant of the precise place where the ship was, and of the misconduct of the captain. But the principle stated by Lord *Ellenborough*, in his judgment on that case, namely, that a delay in the arrival of the vessel at the place where the risk is to attach, alters the risk of the insurer, applies to the present case. And, as in the present case, the jury have expressly found that the delay before the ship arrived at the port where the policy was first to attach, was unreasonable and unjustifiable, we must intend that the risk was in fact varied, and, consequently, the underwriter is discharged from the policy.

We therefore give

Judgment for Defendant.

(a) 14 *East*, 475.

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Plaintiff, owner and captain of a ship, agreed by charterparty to proceed to the *Cape*, and having delivered goods there; to proceed with all convenient speed to *Bombay*, where the freighter engaged to put on board a cargo of cotton for *England*. The Plaintiff was to have the cabins and between decks for his own benefit. Plaintiff arrived at the *Cape*, and might have proceeded on his voyage in two days, but he remained there ten, taking in cattle for the *Mauritius* on his own account: he went round by the *Mauritius* in his way to *Bombay*, and arrived at the latter place six weeks later than he would have done if he had proceeded ~~thence~~ direct. Other ships had arrived in the mean time. The freighter refused to load; and in an action on the charterparty, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the Defendant, a new trial was refused.

THE declaration stated, that by a certain charter-party of affreightment made between the plaintiff, therein described as owner of the ship or vessel called *The Edward Lombe*, of the burthen of 347 tons' registered measurement, or thereabouts, whereof the Plaintiff was commander, then lying in the port of *London*, of the one part, and the Defendant, therein described as freighter of the said ship, of the other part, it was witnessed that the said owner, for the consideration thereafter mentioned, did thereby promise and agree with and to the said freighter, his executors, administrators, and assigns, that the said ship, — being tight, staunch, and strong, and every way properly fitted, victualled, and manned, as was usual for vessels in the merchant service, and for the voyage thereafter named, — the commander of the said ship, or some other proper person in his stead, should and would receive and take on board the said ship in the *West India Dock* in the aforesaid port of *London*, such quantity of lawful merchandise as the said freighter might think proper to ship, not exceeding what the said ship would reasonably stow and carry in the lower hold, reserving sufficient space for fifteen chaldrons of coals, which the owner was allowed to stow therein on his own account; the

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cabins and between decks of the vessel being also reserved for the benefit of the owner and commander; and that having received the same on board, and being despatched therewith not later than the 20th day of *May* then next ensuing, the said commander, or some other proper person in his stead, should and would, wind and weather permitting, set sail and proceed with the said vessel to *Madeira* and the *Cape of Good Hope*, where having discharged or disembarked any goods or passengers destined for those places, she should, with all convenient speed, proceed to *Bombay*, and being arrived there, or so near thereto as the said ship could safely get, and being ready to discharge the aforesaid goods, the said commander, or some other proper person in his stead, should and would give immediate notice thereof to the correspondents or assigns of the said freighter at *Bombay* aforesaid, and should make a right and true delivery of the whole of the said outward goods, excepting such goods, if any, as should have been shipped by the agents of the said freighter at the *Cape of Good Hope* for *Bombay* and *London*, as thereafter, provided for, freight free, and agreeably to bills of lading which should have been signed for the same; and that having completed such delivery, the said commander, or some other proper person as aforesaid, should and would receive and take on board the said ship such a quantity of cotton and other lawful goods, both or either, together with a sufficient quantity of goods, to fill up the broken stowage, and no more, as would not exceed in the whole, including any goods shipped at the *Cape of Good Hope* for *Bombay* and *London*, if any should have been so laden, what the said vessel could reasonably stow and carry in the lower hold, the space occupied by the fifteen chaldrons of coals on the outward voyage being again reserved on the homeward bound voyage, estimating

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estimating the said space as equal to thirty-six pipes of wine or eighteen tons of measurement goods, together with the cabins and between decks, for the benefit of the said owner; and that having received the said goods on board, and completed the loading of the between decks, the said commander, or some other proper person as aforesaid, should and would, wind and weather permitting, set sail and proceed with the said vessel to the *Cape of Good Hope*, and thence to *London*, or direct to *London*, as the case might be; and having arrived at *London*, the said commander, or some other proper person as aforesaid, should and would make a right and true delivery of the said homeward cargo in the *West India* or *London Docks*, as directed by the said freighter, agreeably to bills of lading which should have been signed for the same, and there end the said intended voyage; the acts of God, the king's enemies, restraints of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted: And the said owner did thereby further agree with and to the said freighter, his executors, administrators, and assigns, that the said ship should lie in the port of *London* aforesaid for receiving the said outward goods until the 20th day of *May* then next ensuing, if required by the said freighter, and at *Bombay*, for delivering the said outward goods, and receiving on board the said homeward cargo, and at the *Cape of Good Hope*, in case the said ship should call there on her homeward voyage, for the purpose of the said freighter, as thereafter provided, for the space of fifty running days in the whole, if not sooner despatched, such lay days to commence and be accounted from the days on which the said ship should respectively be ready to discharge the said goods at *Bombay* and the *Cape of Good Hope* aforesaid, and
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notice thereof should be given as aforesaid; and the said owner also agreed to provide sufficient ballast for the said vessel at *Bombay*, in case the correspondents of the said freighter should not provide any or sufficient heavy or dead weight goods for that purpose; and also that the said ship should be addressed to the correspondents of the said freighter at *Bombay* aforesaid, who were to be allowed the usual commission upon all freight or passengers procured by them for the benefit of the said owner in the between decks and cabins: in consideration whereof and of every thing thereinbefore mentioned, the said freighter did therefore for himself, his executors, administrators, and assigns, promise and agree with and to the said owner, his executors, administrators, and assigns, that he the said freighter, his executors, administrators, correspondents, or assigns, some or one of them, should and would, at his and their own costs, expense, and risk, send alongside the said ship in the aforesaid port of *London* such quantity of lawful goods as he might think fit to load, not exceeding as aforesaid, in sufficient time to enable the said ship to clear outwards at that port on or before the 20th day of *May* then next ensuing, and receive the same from alongside the said ship at *Bombay* as aforesaid, and at their or his like costs, expenses, and risks, send alongside the said ship at *Bombay* as aforesaid such quantity of cotton and other lawful goods, both or either, as should be sufficient to load the lower hold of the said vessel, together with a sufficient quantity of goods to fill up the broken stowage, and no more, — the space occupied therein by the fifteen chaldrons of coals on the outward voyage, estimating the said space as equal to thirty-six pipes of wine, or eighteen tons of measurement goods, being again reserved on the homeward voyage for the benefit of the said owner as aforesaid, — and despatch

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spatch her therewith to *London*, or to the *Cape of Good Hope* and *London*, within the days thereinbefore limited for those purposes, or days of demurrage thereafter granted; and in like manner receive the said homeward cargo in the port of *London* with all possible despatch; and should and would well and truly pay or cause to be paid unto the said owner, his executors, administrators, and assigns, in full for the freight of the lower hold of the said ship for the said voyage out and home, and including the freight of all goods discharged and re-laden at the *Cape of Good Hope* as therein stipulated, at and after the rate of 7*l.* sterling money of *Great Britain* per ton for each and every ton stowed in the lower hold when the ship was despatched from *Bombay*, or by the said charterparty engaged to be provided for stowing therein, — always excepting the freight of the space reserved for stowage of thirty-six pipes of wine or eighteen tons of measurement goods for owner's account, — such freight to be paid as follows: 300*l.* part thereof, deducting two months' interest at the rate of 5*l.* per cent. per annum in cash in *London*, to be paid on the day on which the said vessel should clear outwards at the aforesaid port of *London*; 950*l.* further part thereof by the acceptance of the said freighter at two months' date from the same day; and the remainder on a right and true discharge of the said goods, by a good and approved bill payable in *London* at two months' date from the day on which the said ship should report inwards at the custom-house, *London*, after deducting such monies as might have been advanced to the commander of the said vessel by the correspondents of the said freighter at *Bombay* aforesaid, together with the premium of insurance to be effected by the said freighter on freight to the amount of such last-mentioned advance:

And the Plaintiff, in fact, said, that the said ship being

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being tight, staunch, and strong, and every way properly victualled and manned, as was usual for vessels in the merchants' service, and for the voyage in the said charterparty named, the Plaintiff, as commander of the said ship, did afterwards, to wit, on, &c. at, &c. take on board the said ship in the *West India Docks*, in the said port of *London*, such quantity of lawful merchandize as the Defendant thought proper to ship in the lower hold; and having received the same on board, the said ship was afterwards, to wit, &c. at, &c. despatched therewith, and the said Plaintiff then and there set sail and proceeded with the said vessel, with the said goods so on board thereof as aforesaid, to *Madeira* and the *Cape of Good Hope*, &c., and afterwards, to wit, on, &c., at, &c. arrived at *Madeira* and the *Cape of Good Hope*, and then and there discharged and disembarked all the goods and passengers destined for those ports, to wit, at, &c.; and did afterwards, to wit, on, &c. at, &c. proceed with all convenient speed to *Bombay*; and did afterwards, to wit, on, &c. at, &c. arrive at *Bombay* aforesaid; and the said ship was then and there addressed to the correspondents of the said freighter at *Bombay* aforesaid, and the said Plaintiff was then and there ready to discharge the said goods from the said ship, and did then and there give immediate notice thereof to the correspondents and assigns of the said Defendant at *Bombay* aforesaid, to wit, at, &c., and did then and there make a right and true delivery of the whole of the said outward bound goods, except such goods as were shipped by the agents of the said Defendant at the *Cape of Good Hope* for *Bombay* and *London*, freight free, and agreeably to bills of lading which had been signed for the same, according to the terms of the said charterparty, to wit, at, &c.; and having completed such delivery, the said Plaintiff was then and there ready to receive and take on board

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in the lower hold of the said ship at *Bombay* aforesaid from the said freighter, his correspondents or assigns, all such quantity of cotton or other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage as the said freighter, his correspondents or assigns, at *Bombay* aforesaid, should think fit to ship and load on board of the said ship; of all which said several premises the said Defendant afterwards, to wit, on, &c. at, &c. had notice; yet the said Defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to deceive and defraud the said Plaintiff in that behalf, did not, nor would within the said lay days or days of demurrage in the said charterparty mentioned, or either of them, nor did nor would any other person or persons in his behalf, at his or their costs, expense, and risk, send alongside the said ship at *Bombay* aforesaid such a quantity of cotton or other lawful goods, together with a sufficient quantity of goods to fill up the broken stowage, as would have been sufficient to have loaded the lower hold of the said ship, excepting the space so reserved for the benefit of the owner and commander as aforesaid, or any quantity of cotton or other goods, or any goods for broken stowage whatsoever, but wholly neglected and refused so to do, and otherwise wholly failed and made default, to wit, at, &c.; by means of which said several premises, the Plaintiff not only lost and was deprived of all the profit and advantage which he might and otherwise would have made by the freight and primage of the said homeward bound cargo, amounting to a large sum of money, to wit, the sum of 3000*l.*, but was also put to great charges and expenses in and about endeavouring to procure and procuring another freight for his said ship for her homeward voyage, amounting to a further large sum of money, to wit, the sum of 500*l.*; and also, by

by reason of the premises, the said ship or vessel of the Plaintiff was kept and detained at *Bombay* aforesaid divers, to wit, fifty days longer than she otherwise would have been detained at *Bombay* aforesaid, whereby the Plaintiff was not only hindered and prevented from taking divers, to wit, fifty passengers in the said cabins and between decks in the said homeward voyage, which he might and otherwise would have taken, and thereby lost and was deprived of divers great gains and profits, which he might and otherwise would have made thereby, amounting to a further large sum of money, to wit, the further sum of 1000*l.*, but was also forced and obliged to pay, lay out, and expend a large sum of money, to wit, the sum of 200*l.*, in and about maintaining, provisioning, and paying the crew of the said ship during the said fifty days, to wit, at, &c.

The Defendant pleaded the general issue.

At the trial before *Tindal C. J.*, *London* sittings after *Trinity* term 1830, it appeared that the ship sailed from *London* on the 20th of *May* 1828, with a cargo shipped by the Defendant for *Bombay*, and arrived at the *Cape of Good Hope* on the 28th of *September* following. She might have proceeded on her voyage on the 30th, but the captain detained her till the 8th of *October*, being occupied in stowing the between decks, on his own account, with a cargo of mules and cattle for the *Mauritius*. On the 4th of *October*, the Defendant's agents at the *Cape* protested against the delay, and against the ship's going to the *Mauritius*, on the ground that it was out of her course. The captain, however, insisted that it was not out of the course, nor any violation of the terms of the charterparty. He proceeded accordingly; arrived at the *Mauritius* on the 10th of *November*; and remained there till the 19th, discharging his mules and cattle. On the 19th he sailed for *Bombay*, where he

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arrived on the 9th of *January*, 1829; six or seven weeks later than he would have arrived, if, on the 28th of *September*, he had sailed direct from the *Cape of Good Hope* to *Bombay*. In the mean time several ships had arrived at *Bombay* which left *England* subsequently to *The Edward Lombe*; and the Defendant's agents refused to procure a cargo of cotton to freight that ship back. The captain remained at *Bombay* till the 17th of *March*, during which time, he took on board, on his own account, whatever goods he could procure, and then proceeded to *Ceylon* for further cargo, with which he returned to *London*.

The Plaintiff by this action sought to recover the difference in value between the freight so earned and that which would have accrued from the Defendant's cargo of cotton. The freight for the voyage out had been paid, partly in advance.

The Chief Justice told the jury, that inasmuch as the freighter might bring his action against the owner, and recover damages for any ordinary deviation, he could not, for such a deviation, put an end to the contract: but if the deviation was so long and unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end; and he left it to the jury to decide, whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract.


The jury found for the Defendant.

Taddy Serjt. obtained a rule *nisi* to set aside the verdict, on the ground that the Defendant's remedy for the alleged deviation, if he had been injured by it, was by

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by cross action; and that he was not at liberty, in the exercise of his own discretion, to put an end to the contract between him and the Plaintiff. The engagement to sail from the Cape with all reasonable speed was not a condition precedent, but an independent covenant, for the breach of which the Defendant might be entitled to sue; it did not go to the whole of the consideration for the Defendant's contract, as was manifest from the circumstance that the Defendant had not shown that his object in hiring the ship had been defeated by the Plaintiff's delay. Unless it went to the whole consideration, it was not a condition precedent, the neglect of which would entitle the Defendant to determine the contract. In *Bornmann v. Tooke* (a), by a charterparty between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from *Riga* to *Portsmouth*, at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of *Portsmouth*. The ship, however, unnecessarily entered the harbour of *Copenhagen*, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. In an action of *indebitatus assumpsit* for the freight, it was held that the plaintiff's covenant to sail direct to *Portsmouth* was not a condition precedent; and that the deviation could not be given in evidence, either as a bar to the action or to diminish the damages. So, in *Havelocke v. Geddes* (b), it was held that a covenant in a charterparty of affreightment that the owner should at his expense forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c., and keep her so, was

(a) *1 Campb. 376.* (b) *10 East, 553.*

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not a condition precedent to the recovery of the freight, after the freighter had taken the ship into his service and used her for a certain period: but if the freighter should be afterwards delayed or injured by the necessity of repairing her, he would have his remedy in damages. And in *Davidson v. Gwynne (a)*, where the master of a vessel covenanted with the freighter (*inter alia*) that the vessel should proceed with the *first* convoy from *England* for *Spain* and *Portugal*, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same, and then take in a home cargo, and return and make a right and true delivery thereof at *London*, &c., in consideration whereof, and of every thing above mentioned, the freighter covenanted (*inter alia*) to load the vessel out and home, and pay certain freight per ton *per month*, part before, and the remainder on the right and true delivery of the homeward cargo at *London*; it was held, that the master having proceeded with the outward cargo to *Lisbon*, and brought home a return cargo, and delivered the same to the freighter at *London*, was entitled to his freight for the voyage, though he had not sailed with the *first* convoy; the sailing with the first convoy not being a *condition precedent* to his recovering freight for the voyage actually performed, but a distinct covenant for the breach of which he was liable in damages.

Wilde and *Bompas* Serjts. shewed cause. The verdict of the jury, coupled with the previous direction, amounts to a finding that the object of the charterer's contract was entirely defeated by the unjustifiable delay of the Plaintiff:

(a) 12 *East*, 381.

it follows, therefore, that the engagement to proceed from the *Cape* with all reasonable speed was a condition precedent, going to the entire consideration for the contract; and as such, while the contract remained executory, the breach of it was an answer to the Plaintiff's demand. *Boone v. Eyre* (a), *Duke of St. Alban's v. Shore*. (b) The Plaintiff having by his wilful act defeated the object of the Defendant, has no longer any claim against him. Thus, in *Soames v. Lonergan* (c), where the charterers of a ship for a voyage from *Cadix* to *St. Blas*, and thence to *Guayaquil*, to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from *Guayaquil*, with a proviso that in the event of the non-arrival of the first-mentioned ship at *Guayaquil*, then the second charter should be void: it was held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not having been attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. In *Touteng v. Hubbard* (d), where a *British* merchant chartered a *Swedish* ship on a voyage to *St. Michael's* for a cargo of fruit, and the charterparty contained the usual exception against the restraint of princes, the ship having been prevented from reaching *St. Michael's* within the fruit season by an embargo laid on *Swedish* vessels by the *British* government, it was held the *Swedish* owner could not, by proceeding on the voyage after the embargo was taken off, entitle himself to recover the freight against the *British* merchant.

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(a) 2 *W. Blacks.* 1312.(b) 1 *H. Blacks.* 270.(c) 2 *B. & C.* 564.(d) 3 *B. & P.* 291.

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in the *Shadforth* (v) *Atterton* (a), where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived on time and was ready by the 25th of June. It was held that as she did not arrive out till after the 25th of June, the freighter was entirely discharged from his contract to furnish a cargo.

In the cases relied on for the Plaintiff, either the stipulation was a condition precedent, or it did not appear as in the present case, that the party had been deprived of the benefit of the contract. Thus, in *Bornmann v. Thoburn*, there was no finding that the object of the defendant had been defeated. In *Woodcock v. Geddes* the defendant made use of the ship, and thereby waived the right of insisting on seaworthiness as a condition precedent. In *Minidivision v. Gray* the benefit of the voyage was obtained although the ship did not sail, according to the agreement, with the first convoy. Whether or not a stipulation shall operate as a condition precedent, and give rise to the entire consideration, depends, says Lord Ellenborough, not on any formal arrangement of the words, but on the sense and reason of the thing, as is to be collected from the whole contract. *Ritchie v. Hutchinson* (b), and on that principle all the cases may be reconciled; *Thomas v. Cartwright* (c), *Goodisson v. Nunn* (d), *Pontif v. Shepherd* (e), *Campbell v. Jones* (g), *Cook v. Jennings* (h), *Glasbrook v. Woodrow* (i), *Smith v. Wilson* (k), *Storer v. Gordon* (l), *Fothergill v. Walton* (m)

in the cases mentioned, and in the case of the *Shadforth*.

(a) 3 Camp. 333. (b) 7 T. R. 381.

(c) 19 East. 396. (d) 8 T. R. 466.

(e) 11 Wiles. 496. (f) 8 East. 437.

(g) 6 T. R. 761. (h) 3 M. & S. 308.

(i) 6 T. R. 665.

(m) 8 Taunt. 576.

(k) 6 T. R. 570. (l)

Com.

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Com. Dig. Condition Precedent (G 5). It is expressed that it ought to be performed within a reasonable time, and that if it is not performed within that time, the contract is void. In *Taddy v. The Defendant*, having had the benefit of the outward voyage, and having obtained no proof of loss occasioned by the late arrival of the ship at Bombay, it was not competent to the jury to find that the whole object of the contract was defeated. In *Toulmin v. Hubbard*, *Scanes v. Loderger*, and *Shadforth v. Flegg*, nothing was done for the benefit of the charterers on the outward voyage; the ships went out in ballast. And in *Havlock v. Girdles*, Lord Ellenborough said, "Had the Plaintiff's neglect precluded the Defendant from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; but as the Defendant has had some use of the vessel, notwithstanding the Plaintiff's neglect, the Plaintiff's covenant is to be considered as going to a part only; the consideration has not wholly failed, and the covenant cannot be looked upon as having raised a condition precedent, but merely given the Defendant a right under a counter-claim to such damages as they can prove they have sustained from such neglect." [Tindal C. J.] The Plaintiff here has been paid for the outward voyage. Still *Barnham v. Tooke* and *Constable v. Clabrie* (a) are express authorities to shew that the stipulation here as to proceeding direct to Bombay was not a condition precedent. *Goodisson v. Nunn*, *Gleesbrook v. Woodrow*, and *Kingston v. Preston* (b), there cited, were all cases of sale and purchase, involving concurrent conditions, which could not be pleaded one against the other, and inapplicable to the present case; but *Campbell v. Jones* (c) is in point for the Plaintiff. There A. in

(a) *Palm*. 397.

(c) 6 T. R. 570.

(b) Cited at large in *Jones v. Barkley*, Doug. 680.

consider-

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consideration of 250*l.* paid by *B.*, and of the further sum of 250*l.* to be paid, &c., covenanted that he would, with all possible expedition, instruct *B.* in a certain mode of bleaching linen (for which he had obtained a patent); and *B.* covenanted that he would, on or before the 25th of February 1794, or sooner, if *A.* should before that time have instructed him, &c. pay the further sum of 250*l.*; it was held, that the covenants of *A.* and *B.* were independent covenants; and that *A.* might sue *B.* for the 250*l.*, without averring that he had taught *B.* the mode of bleaching linen, &c.

Cur. adv. vult.

TINDAL C. J. This was an action of *assumpsit*, upon a charter by the Plaintiff to the Defendant of the ship *Edward Lombe*, from London to Madeira and the Cape of Good Hope, and thence to Bombay and back; the Plaintiff claiming a compensation in damages against the Defendant for not loading the ship with a cargo of cotton at Bombay.

At the trial it appeared in evidence, that, instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the island of *Mauritius*; and that the Defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo.

The point left to the jury at the trial was, whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; the jury being told that if such was their opinion, the Defendant was excused, by the act of the Plaintiff's captain, from furnishing a cargo.

The jury having determined that question in the affirmative, and having found a verdict for the Defendant, a motion was made to set the verdict aside, and for a new trial, on the ground of misdirection.

But,

But, after hearing the arguments against and in support of the rule, we are of opinion, upon the same principle as that which was laid down in the case of *Mount v. Larkins* (a), and which we therefore think it is unnecessary to repeat, that the direction was right; and we therefore think the rule for a new trial must be discharged.

Rule discharged.

(a) *Ante*, p. 108.

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MEMORANDUM.

Pursuant to a statute passed in the last session of Parliament, His Majesty issued his letters patent, dated the 5th *December*, 1831, constituting a Court, to be called "A COURT OF BANKRUPTCY;" and appointed The Honorable *Thomas Erskine* to be Chief Justice; *Albert Pell*, *John Cross*, and *George Rose*, Esquires, to be Puisne Judges. The Chief Justice to take precedence in rank next to the Puisne Judges of the other Courts, and after him the other Judges.

Six Commissioners were also appointed; viz. *C. F. Williams*, *J. H. Merivale*, *J. Evans*, *R. G. C. Fane*, *E. Holroyd*, and *J. S. M. Fontblanque*, Esquires.

Mr. Serjt. *Ed. Lawes* was appointed Chief Registrar.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1832.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Second Year of the Reign of WILLIAM IV.

MEREDITH v. DREW.

Jan. 13.

THE Plaintiff had declared in debt for 7*l*.

By the *Bath* court of requests act, a Plaintiff who sues in another court for a debt he might have recovered in the *Bath* court, shall not, by reason of a verdict for

Merewether Serjt. moved to stay proceedings upon payment of the debt without costs, the Defendant carrying on his business in the city of *Bath*, and claiming to be within the jurisdiction of the *Bath* court of requests act, 45 G. 3. c. 67., by which commissioners are authorized to decide all disputes and differences between party and party, for any sum not exceeding 10*l*. in all actions

him, be entitled to costs.

This Court refused to stay proceedings before verdict, upon payment of debt without costs, upon the ground that the action ought to have been brought in the *Bath* court.

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or causes of debt; and it is made lawful for any persons, whether they reside within the jurisdiction of the said Court or not, having any debts not exceeding the value of 10*l.*, due by or from any persons whatever, *inhabiting, residing, or being within the said city*, or the liberty and precincts thereof, to proceed by summons in the said court; and if any action for any debt recoverable in the said court shall be commenced in any other court, the Plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to any costs.

Although the case had not proceeded to verdict, this Court, he contended, would interfere at once to prevent unnecessary expense. In *Dunster v. Day* (a) it was held, that after judgment by default, and the damages assessed upon a writ of enquiry, the Defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs. That case was under the *London* court of requests act, but the language in both acts is the same, and an application before verdict, comes as much within the reason of the act as an application after.

PARK J. I think not: the party is not in the stage of proceeding contemplated by the act, and that is a sufficient reason for us not to interfere; besides, he who asks for justice should do justice.

ALDERSON J.(b) The Defendant might be compelled to go on at the expense of paying his own costs in any event: he comes here to ask for a favour, and ought at least to do justice himself.

Rule refused.

(a) 8 *East*, 239.

(b) The other Judges were absent, on the special commissions.

1832.

PIRIE v. IRON.

Jan. 14.

ON the 12th instant a rule had been obtained under 1 W. 4. c. 22. for examining, this day, before the prothonotary certain witnesses for the Plaintiff, upon an affidavit that they were immediately about to sail for India.

Practice.
Examination
of witnesses
by protho-
notary.

The Defendant's agent had notice of the rule the day it was obtained, and immediately wrote to the Defendant's attorney at *Dover*, but no answer having arrived this day by return of post,

Merewether Serjt. moved that the examination of the witnesses might be deferred till the Defendant's attorney could be present to cross-examine them, without which great injustice might be done to the Defendant.

The Court observed that such delay might defeat the object of the act of parliament; and it was then asserted that the witnesses were about to sail on the morrow; upon which,

Merewether contended that the preparations for a voyage to *India* requiring much time, the Plaintiff must have been long apprized of the witnesses' probable departure, and must have deferred his application to the last moment, in order to elude a cross-examination.

Sed per Curiam. Let the examination be taken provisionally; the Plaintiff to satisfy the Court by affidavit that the application has not been delayed with any sinister intention.

1832.

Jan. 14.

GWILT v. CRAWLEY.

Defendant's attorney had notice, Nov. 26th, that his cause was set down for trial; five days afterwards it was called on and tried as an undefended cause, no one appearing for the Defendant.

The Defendant's attorney having on the day of trial delivered no briefs, the Court refused a new trial upon any terms.

THIS was an action against the Defendant for running over the Plaintiff in a gig.

The cause was set down for trial at the *Middlesex* sittings on the 26th of *November* last, and was called on, the 2d of *December*.

No one appeared on the part of the Defendant; but the case having been fully proved, a verdict was taken for the Plaintiff.

Storks Serjt. now moved, on payment of costs, for a new trial, on an affidavit that the cause was the last of fifteen appointed for trial on the 2d of *December*; that the Defendant's attorney did not expect it could come to his turn on that day; that he had examined a number of witnesses who could prove the innocence of the Defendant; and that the application was not made for delay. It appeared, however, that the Defendant's attorney had notice on the 26th of *November* that the cause stood for trial, and that his clerk attended in court to watch the progress of the causes two or three days; but it did not appear that he had delivered any brief to counsel, or had examined any witnesses before the cause had been actually tried.

TINDAL C. J. The rule cannot be granted. The Defendant's attorney knew on the 26th of *November* that the cause was set down for trial; and though it was not called on till the 2d of *December*, he had not up to that time delivered a brief or examined the Defendant's witnesses. It would be a gross injustice to plaintiffs if we were to listen to the application, as it would

would enable defendants to lie by, and after learning the particulars of the plaintiff's case to harass him with a new trial and evidence got up in answer.

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PARK J. concurred.

ALDERSON J. If the Defendant's attorney had been present when the cause was called on, the Court before putting off the trial would have required him to shew that he had delivered a brief, or had taken some steps to prepare for trial : he does not depose that, even now ; and as a new trial would necessarily occasion delay to the Plaintiff, the rule must be

Refused.

MACARTHY v. SMITH.

Jan. 14.

DECLARATION for goods sold and delivered, money had and received, &c.

Bill of particulars for goods sold only, appended to the record pursuant to the late rule.

At the trial the defence was, that the goods had been delivered to the Defendant as an agent upon sale and return. It appeared, however, that he had sold some of them to the amount of 3*l*. 18*s*.

After the Chief Justice, before whom the cause was tried, had done summing up, the counsel for the Defendant objected that the bill of particulars contained no demand for money had and received, to which it was answered, that the delivery of the bill of particulars had not been proved ; but the learned Judge thought this unnecessary since the adoption of rule for appending the

When the bill of particulars is appended to the record pursuant to the rule of Court, it is not necessary to prove the delivery of it to Defendant.

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particulars to the record, and nonsuited the Plaintiff, with leave to move the Court.

Heath Serjt. accordingly now moved to set aside the nonsuit, contending, that the rule for annexing the bill of particulars did not dispense with the necessity for proving the delivery of them to the Defendant; and that, at all events, the objection on the part of the Defendant was taken too late.

TINDAL C. J. The Court cannot interfere. The object of the late rule was to save the trouble of proving the bill of particulars. The Plaintiff here was out of Court upon his demand for goods sold, and then resorted to a claim for money had and received. The Defendant might fairly say, that if such a claim had been presented on the bill of particulars, he would not have gone to trial.

Rule refused.

Jan. 17.

DOE dem. SCRUTON v. SNAITH.

A mortgage deed for 3000*l.* contained a power of sale and leasing to secure the principal and all expenses, with interest; there was also a covenant to pay principal and interest, and all expenses, with interest on the amount of them:

EJECTMENT on a mortgage deed, by which, in consideration of 1700*l.* paid by the lessor of the Plaintiff to discharge a former mortgage, and of 1300*l.* actually advanced to the mortgagor, the mortgagor on the 6th of *April* 1828 conveyed the premises in question to the lessor of the Plaintiff in fee; provided always, that if the mortgagor should pay to the mort-

Held, not a security for an uncertain and indefinite amount under 55 G. 3. c. 184. and that a 9*l.* stamp was sufficient.

gagee

gagee 3000*l.* and all sums which the mortgagee should expend or disburse for or in respect of those presents, with interest after the rate of 4*l.* 10*s.* per cent., on the 6th of *October* then next, the conveyance should be void; but if, after notice, three months should elapse without such payment, the mortgagee should be at liberty to enter and receive rents, and should be invested with a power to make leases, and to sell, and pay the expenses and 3000*l.* and interest, and after payment hold in trust for the mortgagor. There was a covenant from the mortgagor to pay 3000*l.* and interest, and all costs with interest.

The deed was stamped with a stamp of 9*l.*

Upon which it was objected at the trial before *Parke J.*, that the deed was made as a security for the repayment of money uncertain and unlimited in amount, and that therefore the stamp ought to have been 25*l.* under 55 G. 3. c. 184. *sched. tit. Mortgage.*

A verdict having been taken for the Plaintiff, with leave for the Defendant to move to enter a nonsuit,

Jones Serjt. obtained a rule *nisi* to that effect.

Wilde Serjt. shewed cause.

By the statute 9*l.* is the amount of stamp on a mortgage "where the same shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due or owing, or forborne to be paid, being payable, exceeding 4000*l.* and not exceeding 5000*l.*

"And where the same shall be made as a security for the repayment of money, to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except

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any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage, or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed, whereby any annuity shall be granted or secured for such life or lives, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l*."

The sum secured to the lessor of the Plaintiff is the definite and certain sum of 3000*l*. It is true that he is empowered to defray his expenses; but if the deed had omitted to give him that power, it would not have secured 3000*l*., but 3000*l*. *minus* the expenses. And it makes no difference that the lessor of the Plaintiff is to receive interest upon the amount of those expenses; for in *Pruessing v. Ing* (a) a stamp applicable to a note not exceeding 30*l*. was held applicable to a note for the payment of 30*l*. at three months after date, with interest from the date; and Lord *Tenterden* C. J. said, "The object of the legislature was to impose a *pro ratâ* stamp-duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of that money." So in *Deardon v. Binns* (b) it was held, that a bond conditioned for the payment of money and interest, and also for the performance of collateral acts, required only the *ad valorem* stamp, appropriated to the principal sum, where that stamp exceeded the 1*l*. 15*s*., which the collateral matter would require if it stood alone.

In *Dickson v. Cass* (c), indeed, where a bond was given for 2000*l*.; the condition of which, — after reciting that *A*.

(a) 4 B. & A. 204.

(b) 1 Mann. & Ry. 130.

(c) 1 B. & Adol. 343.

and

and *B.* had opened an account with *D.*, *E.*, *F.*, and *G.*, as bankers, and that the bankers had agreed to discount bills and pay in advance for *A.* and *B.* any sum of money not exceeding 1000*l.* in the whole,—was, that *A.*, *B.*, and *C.* should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c., together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest, it was held, that that being a bond to secure not only 1000*l.*, but a further sum for the bankers' charges for commission, &c., the stamp of 5*l.* required by the 55 *G. 3. c. 184. sched. part i. tit. Bond, given to secure a sum exceeding 500*l.*, but not exceeding 1000*l.*, was not sufficient.*

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But there the bond was to be a security, not only for the 1000*l.* to be actually advanced, but for such commission as bankers usually charge on such advances. The sum payable on commission was something to be gained beyond the sum of 1000*l.*; and upon that ground *Bayley J.* rested his judgment that the stamp was insufficient. Here the reimbursement of costs would be no gain to the mortgagee, although the nonpayment of them would be a loss. If there had been no stipulation on the subject the mortgagee would be entitled to hold the estate till he was satisfied all his expenses as well as the money lent.

Jones. Without an express stipulation he could never require or obtain interest upon the amount of his expenses; that interest, therefore, renders the sum secured uncertain and indefinite, and the higher stamp is necessary. But it may be considered, that the sum secured is rendered uncertain by the stipulation that the expenses are to be secured as well as the 3000*l.*; for sums advanced for insurance against fire of property contained

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contained in a mortgage, or for insurance of lives upon an annuity-deed, being expressly excepted, when added to the principal sum, it may be inferred the legislature meant to include every other charge which might be added to a mortgage.

TINDAL C. J. On the proper construction of the act of parliament, I think a stamp of 9*l.* was sufficient in this case. The question arises on a clause in the act under the term *mortgage* in the schedule. On looking at that clause, it is obvious that the main intention of the legislature was to impose a stamp proportioned to the sum advanced or lent; and the only question is, whether it was intended to affect a security against a contingent loss to the lender. The words of the act are—“Where the same shall be made as a security for payment of any definite and certain sum of money, advanced or lent at the time, or previously due or owing, or forborne to be paid, being payable, exceeding 4000*l.* and not exceeding 5000*l.*, 9*l.*; and where the same shall be made as a security for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; other than and except any sum or sums of money to be advanced for the insurance of any property comprised in such mortgage, or security against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in any deed whereby any annuity shall be granted or secured for such life or lives, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, 25*l.*”

These two latter clauses must be taken to pursue the intention of the legislature as expressed in the first, namely, to cover money actually advanced on security.

Looking

Looking at the deed in question, the object of the parties appears to have been to secure two sums, one of 1700*l.*, the other of 1300*l.*; and the question is, whether a proviso and subsequent covenant to indemnify the lender against expenses which he may possibly incur to recover the money lent, can be so blended with that money as to impose the necessity of a stamp of higher amount: and we are of opinion that such a stamp is not necessary; for this deed contains no power which the mortgagee might not enforce under an ordinary mortgage. By a condition subsequent the mortgagee is authorised to recover expenses which, without such condition, he would be allowed in the Master's office. We cannot put upon this condition subsequent the construction of an unlimited advance requiring a 25*l.* stamp, unless we put the same construction on an ordinary mortgage deed. It has been contended that the exemption in the statute, of the expense of insurance, implies an intention on the part of the legislature that all other expenses should be included in the amount for which the stamp is to be paid; but insurance is a different and collateral security, and the expense incurred in effecting it could not be claimed under the ordinary form of mortgage. The case of *Dickson v. Cass* is clearly distinguishable from the present. There, a bond was given for 2000*l.*, the condition of which, — after reciting that *A.* and *B.* had opened an account with *D.*, *E.*, *F.*, and *G.*, as bankers, and that the bankers had agreed to discount bills and pay in advance for *A.* and *B.* any sum of money not exceeding 1000*l.* in the whole, — was, that *A.*, *B.*, and *C.* should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills, &c., together with such lawful charges and allowances for advancing and paying such bills as are usually charged by bankers in such cases, and interest; and the Court held, that that being a bond to secure, not only 1000*l.*,

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1000*l.*, but a further sum for the bankers' charges for commission, &c., the stamp of 5*l.* required by the 55 G. 3. c. 184. *sched.* part i. tit. *Bond, given to secure a sum exceeding 500*l.*, but not exceeding 1000*l.*, was not sufficient.*

The charge for commission was necessary, in the first instance, to render the instrument available, and without it the borrower could not obtain the sum he required. The expenses provided for in the present deed have no relation to the borrowing of the money, but may subsequently become necessary to make the security complete to the lender. Those charges for commission on the advances the bankers would not have been entitled to unless by express stipulation; the charges here, the mortgagee might have recovered whether he had stipulated for them or not. Therefore, as all stamp acts, being a burden on the subject, must be clearly expressed wherever they impose the burden, I should say, that even if there were doubt, we should take the smaller sum; but that in this case, as it is plain that no more than 3000*l.* was advanced to the mortgagee, the stamp which has been affixed to the deed must be deemed sufficient.

PARK J. I am of the same opinion. We must look to the precise words of these revenue acts, because, in some degree, they operate as penalties. Now, in this case, the sum named in the deed was not a security for the payment of any "sum of money thereafter to be lent," or "uncertain in amount." The true way to consider the question is, whether these expenses would not necessarily follow the power of lease and sale. In a court of equity, they would be considered incidental to the mortgage; and after the mortgagee shall have been reimbursed all expenses he may incur, the principal sum secured to him here is no more than 3000*l.* As to the argument

argument drawn from the exception in favour of insurances against fire, the answer has been given by the Chief Justice; and in *Dixon v. Cass* the borrower could not raise the money he proposed to obtain without adding the previous charge of the banker's commission.

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BOSANQUET J. I am of opinion that the stamp upon this deed was sufficient. The question turns on the construction of a statute imposing a duty, and we must take care that no higher duty is imposed than the legislature intended. It appears to me that the deed in question is a security for a definite, and not for an uncertain sum. *Pruessing v. Ing* is a decisive authority to shew that the reservation of interest is not to be considered an addition to the sum advanced. The question therefore remains, whether a stipulation for reimbursing the mortgagee his expenses is to be considered as making an addition to the sum advanced or secured, or as rendering it of uncertain amount. Now, in *Dixon v. Cass*, which has been referred to in support of the argument for a higher stamp, the expenses secured were expenses attending the advance of the money, and not expenses attending its recovery. Here the expenses are the expenses of recovery, and it was not necessary that they should have been mentioned at all. Expenses which are incurred only for the purpose of recovering the principal money lent will not take the deed out of the operation of that clause of the act which applies to securities for a sum certain, because, when they are all defrayed, the mortgagee will have no more in pocket than the sum he originally advanced.

ALDERSON J. I think the stamp was sufficient. The case is governed by the decision in *Pruessing v. Ing*, where the reservation of interest upon the face of a promissory note was held to make no difference in the amount

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amount of the stamp, *Abbott C. J.* saying, "the object of the legislature was to impose a *pro ratâ* stamp duty upon the sum actually due at the time of taking the security, and not upon what might become due in future for the use of the money." The mortgagee here would have been in no worse situation if the deed had contained no stipulation for the expenses; and *expressio illorum quæ tacitè insunt nihil operatur*.

In *Dixon v. Cass* the Defendant would not have been responsible for the banker's commission and other charges without an express stipulation to secure them. That case, therefore, does not apply to the present, and the rule for a nonsuit must be

Discharged.

Jan. 17.

ACRAMAN v. HARRISON.

It is too late to move to bring up an insolvent under the compulsory clause of the Lords' Act on the seventh day of term.

MEREWETHER Serjt. moved on the part of the Plaintiff, a creditor, to bring up the Defendant, a prisoner, under the compulsory clause in the Lords' act, 32 G. 2. c. 28. s. 16., by which creditors are authorized and empowered to require prisoners, on giving twenty days' notice in writing, to give in to the court of law, from which the writ or process issued, on which any such prisoners are charged in execution, or into the Court in the prison of which such prisoners have been or shall be removed by *habeas corpus*, or shall remain or be charged in execution, within the first seven days of the term which shall next ensue the expiration of the said twenty days, a true account in writing of the estate of such prisoners.

But this being the seventh day of the term, and it being

being impossible to bring up the Defendant in the course of the day, the Court held the application too late, and *Merewether*

Took nothing.

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HARRISON.

PALMER v. MARSHALL.

Jan. 21.

THIS was an action on a policy of insurance on a yacht at and from *Bristol to London*, and the Plaintiff had laid the venue in *Dorsetshire*, where the cause was tried at the last assizes, when a verdict was found for the Plaintiff, upon which the Defendant afterwards obtained a rule absolute for a new trial. (See *ante*, p. 79.)

The Plaintiff's witnesses at the first trial were all from *London*, where both the parties resided; and, upon affidavit of these facts,

In an action on a policy of insurance, the Court refused upon a new trial to change the venue from *Dorset to London*, upon the ground that both the parties lived in *London*, and that all the witnesses came from *London* on the first trial.

Wilde Serjt., on the part of the Defendant, obtained a rule *nisi* to change the venue to *London*, for the purpose of saving expense, and obtaining a jury more conversant in matters of insurance.

Merewether Serjt., who opposed the rule, urged that no sufficient reason had been assigned for changing the venue. The change would now, when the assizes were so near at hand, operate as a delay to the Plaintiff, who had the privilege of laying the venue where he pleased; and

The Court, assenting to this, although they admitted, that in some cases circumstances might be sufficiently strong to induce them to change the venue, the

Rule was discharged.

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COMBE and Others v. WOOLF.

Defendant guaranteed the payment of porter to be delivered by Plaintiff to J. the guaranty contained no stipulation as to the credit to be given to J. The custom of the Plaintiff was to give six months, and then, sometimes, to take a bill at two. The Plaintiff having, without the knowledge of the Defendant, given J. eleven months' credit, Held, that the Defendant was discharged from his guaranty.

THE declaration stated that on the 23d of May 1827, at *Westminster*, by a certain memorandum or undertaking made and given by the Defendant to the Plaintiffs, the Defendant guaranteed and engaged to see the Plaintiffs paid for any porter which the Plaintiffs might send to one *Abraham Joseph* of the town of *Renzaunce*, until the Plaintiffs should receive notice to the contrary from the Defendant. And the said memorandum or undertaking being so made as aforesaid, to wit, at, &c., in consideration thereof, and that the Plaintiffs, at the special instance and request of the Defendant, had then and there undertaken and faithfully promised the Defendant to perform and fulfil the terms of the said memorandum or undertaking in all things on their part and behalf to be performed and fulfilled, the Defendant undertook, and then and there faithfully promised the Plaintiffs to perform and fulfil the terms of the said memorandum or undertaking in all things on his part and behalf to be performed and fulfilled. The Plaintiffs then averred that they, confiding in the said undertaking of the Defendant, did afterwards, to wit, on, &c., sell, send, and deliver to the said *Abraham Joseph* certain porter of great value, which the said *Abraham Joseph* had occasion for and required of the Plaintiffs, and at and for certain reasonable prices then and there agreed upon by and between the Plaintiffs and *Abraham Joseph*, amounting in the whole to a large sum of money, to wit, 150l.: and although the said *Abraham Joseph* was, on 1st of April 1831, at, &c., requested by the Plaintiffs to pay the said sum of money, yet the said *Abraham Joseph*

Joseph had not as yet paid said sum of 150*l.* or any part thereof, but had hitherto wholly neglected and refused so to do; of all which said premises the Defendant on the day and year last aforesaid, had notice; yet the Defendant had not as yet paid the Plaintiffs the said sum of money or any part thereof for the said porter or any part thereof, but still neglected and refused so to do, and said sum of 150*l.* still remained due and unpaid.

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At the trial before *Park J., Middlesex* sittings in last *Michaelmas* term, it appeared that the Defendant had executed the following guaranty to the Plaintiffs, who were brewers: —

“ *Penzance, May 23. 1827.*

“ Messrs. *Combe, Delafield, and Co.*

“ I hereby guarantee and engage to see you paid for any porter you may send Mr. *Abraham Joseph* of this town, until you receive notice to the contrary from me.

Leman Woolf.”

According to the invoices, the course of the Plaintiffs’ business was to give six months’ credit, or cash 2½ discount; and it was their custom to extend the credit by taking at the end of the six months a two months’ bill. Casks charged in the invoice, but allowed for if returned. After the guaranty had been given, the Plaintiffs furnished *Joseph* with porter from time to time; and on the 1st of *December* 1829 there was a balance due of 45*l.* for that article. The Plaintiffs applied to *Joseph* in *June* 1830 for the amount, and again in *August*, when, failing to obtain it, they threatened *Joseph* on the 29th of *September* that they would proceed against the Defendant; upon which *Joseph* sent them his promissory note, dated 4th of *October*, payable two months after date. On the 18th of *November*, *Joseph* became bankrupt, whereupon this action was brought against his guarantee.

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The Plaintiffs also claimed 17*l.* 5*s.* for casks not returned; but these, though furnished subsequently to the Defendant's guaranty, were not the identical casks which had contained the porter in respect of which this action was brought. It was left to the jury to say whether the course of dealing between the parties had been altered, and time had been given to the debtor.

The jury found that the course of dealing, prescribed by the invoices, had been altered, but that, as practical men, they thought the credit to *Joseph* had not been extended; whereupon the verdict was found for the Plaintiffs, with leave for the Defendant to move to set it aside, on the ground that he had been discharged by the time granted to *Joseph*, and that, at all events, he was not liable for the casks, having guaranteed only the *porter* furnished to *Joseph*.

Wilde Serjt. having obtained a rule *nisi* accordingly,

Taddy Serjt. shewed cause. The Defendant not having stipulated by his guaranty that the credit to *Joseph* should be limited to any particular time, is not discharged by the indulgence which has been given. It has, indeed, been established in courts of equity, that if a creditor give time to his debtor, he cannot sue the surety till that time is expired. But the surety is not discharged entirely; his liability is only suspended, and revives when the period of indulgence has expired. Thus, in *The London Assurance Company v. Buckle* (a), where a bond was executed by an insurance broker, as the principal obligor, and two sureties, with a condition, that if they should pay the obligees such premiums as should become due for assurances on ships at sea, to be made with the obligees by the insurance broker, within six months after the making of the insurances,

(a) 4 B. M. 153.

the bond was to be void: the broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission: the premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy: but it was held, that the sureties were not discharged by the *laches* of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. So, in *Goring v. Edwards* (a), in April 1825, defendant guaranteed the payment of money due from his son to the plaintiff upon a sale of timber: the plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till December 1817, when the son became bankrupt: the plaintiff never disclosed to the defendant the issue of these applications; but in December 1827 sued him on his guaranty: it was held, that the defendant was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son.

It is true, the creditor must conduct himself towards his debtor in the same way as he would have done if the guaranty had not been given; for if he conduct himself otherwise it is a fraud on the surety: thus in *English v. Darley* (b), the indorsee of a bill, having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only; he was holden to be thereby precluded from afterwards suing the indorser. But if the creditor merely extend the credit given, the surety is still liable when the credit is at an end. And he is not injured by the indulgence shewn to the debtor.

(a) 6 Bingb. 94.

(b) 2 B. & P. 61.

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 Wood.

In *Bastow v. Bennett* (a) there was, in effect, a fraud upon the surety. But upon the guaranty in this case there was no previous dealing, nor any stipulation to limit the credit given to the debtor.

And the Defendant's guaranty extends to the casks as well as the porter. One who guarantees the expense of liquors necessarily guarantees the vessels in which they are contained, as an inseparable accessory; just as one who contracts to admit another to the opera, contracts by implication to admit with him the clothes he wears on his back.

Wilde Serjt, contra, was stopped by the Court,

TINDAL C. J. This rule must be made absolute. The case presents two subjects for our consideration: the demand for 45*l.* in respect of porter furnished by the Plaintiffs to *Joseph*, and the demand for 17*l.*, the value of casks, which had contained, not the porter in question, but porter furnished at some other time.

As to the demand for 45*l.*, we think the Defendant was discharged from his guaranty by the Plaintiffs giving time to *Joseph*, the indulgence never having been assented to by the Defendant. It is clear from the evidence that time was so given. The course of the Plaintiffs' business was to give credit for six months, or allow 2½ per cent. discount for cash. This credit was sometimes extended by a bill at two months. In the present instance the Plaintiffs allow three months to elapse after the six, and are then paid by a note at two; thus, virtually giving a credit of eleven months; and this, not as a matter of favour which they might afterwards repudiate, but as a right on which *Joseph* might insist, for after the receipt of the note, payment could no longer be demanded till it had run its time.

(a) 3 *Campb.* 220.

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The surety, therefore, is exonerated on this general principle, that the Plaintiffs have, without his assent, altered the situation in which he had a right to expect he should be placed when he gave the guaranty.

It has been contended, that though the surety has sometimes, under such circumstances, been held to be discharged in equity, such is not the rule in courts of law. But except where a surety has entered into a bond for payment in default of the principal debtor, courts of law, as well as courts of equity, have always held the surety to be discharged where, without his assent, time has been given to the principal debtor. Where the surety has entered into such a bond, and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to a court of equity because by the rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal. (a)

In the present case, although no specific time of payment is fixed by the guaranty, yet it must be implied that the guaranty was given on the supposition that the debtor would not have more than the usual credit.

But how, it is said, is the situation of the surety altered by this? At the end of eight months he had a right to enquire whether the debt due to the Plaintiffs had been discharged, and if he found it still due, to take his measures against the debtor accordingly; whereas if the creditor could, without his assent, extend the credit to an unlimited time, the surety might be deprived of all remedy by the subsequent insolvency of the debtor; a danger to which he would equally be exposed, although he should be remitted to his right

(a) *Davey v. Prendergrass*, 5 B. & S. A. 187, and see *Rees v. Berrington*, 2 Ves. jun. 542.

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against the debtor, provided the creditor forbore to sue till the extended term had expired.

With respect to the casks, if the action had been brought for the identical casks in which the porter had been contained, perhaps they might be considered as accessory, and falling within the same rule as the principal demand; but as the casks in question were furnished on a different occasion, they are not within the meaning of the guaranty, and, at all events, are not within the terms of the declaration.

PARK J. I agree that this rule must be made absolute. In coming to this decision we do not infringe on the cases which have decided that mere laches on the part of the creditor will not discharge the surety. The distinction taken in all the cases is between mere laches, or omission to press the debtor, and giving him a right to farther time. As in *English v. Darley*, where the indorsee of a bill having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only; he was held to be precluded from afterwards suing the indorser. In *Orme v. Young (a)* it was contended that the surety should have had notice of the creditor's abstaining to proceed; but *Gibbs C.J.* held that the mere want of notice did not discharge the surety, and said, "What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief; because, the principal having tied his

(a) *Holt, N. P. C. 84.*

own hands, the surety cannot release them. Here there is no contract to forbear; no impediment to the suit. A neglect to give notice to the surety that the debtor has made default, does not discharge him." In the present case there was a positive prevention of any suit by the principal creditor; for when he had tied up his own hands for months, the surety could make no claim at the expiration of the usual time; and it is by the risk that the debtor may become insolvent in the intermediate time, that the surety is injured.

As for the casks, if the defendant were liable at all, I think he would be liable for the casks also, supposing the porter in question to have been contained in them; but these were sent at a different time, and are neither mentioned in the guaranty nor in the special count.

BOSANQUET J. The rule must be absolute. Although the surety has not stipulated for any particular credit, the course of dealing between the Plaintiffs and their debtor was altered, and the usual time of credit extended. It is admitted that the surety could not be sued during the time of the extended credit, which has been given without any notice to him, but it is contended that his liability revives after the extended credit has expired. But how is the claim against the surety supposed to be suspended? not by agreement between the parties but by operation of law; in other words, if an action were brought against him during the extended time, the indulgence given would be a bar to the action. If, however, it would, under such circumstances, be a bar at any time, it is a bar for ever, although the case would be very different if the action had been suspended by agreement. It has been urged that the surety is not injured by the indulgence shewn to the debtor. But he may be materially injured if the circumstances of the debtor decline during the time of the extended credit: the surety,

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who might have been reimbursed at the earlier period, may be without remedy at the later.

As to the 17*l.* claimed for the casks, I think the plaintiffs are not entitled to recover it at the hands of the defendant. It seems there was a distinct course of dealing with respect to the porter and with respect to the casks; it may be doubted, therefore, whether a guaranty which mentions porter only can be applied to casks; but whether that be so or not it was at least incumbent on the plaintiff to state in alleging the breach of contract, that the casks were not returned; this he has altogether omitted, and therefore is not entitled to recover.

ALDERSON J. I am of the same opinion. The first question has been decided by the case of *Orme v. Young*, and the principle there laid down. Delay on the part of the creditor is no discharge to the surety, but the creditor's binding himself down not to sue the debtor is a discharge for all time as well as for the period during which indulgence is extended to the debtor.

As to the question touching the casks, on which I entertain some doubt, it is sufficient to say that the demand in the declaration does not apply to them.

Rule absolute.

1832.

SUTTON v. CLARK.

Jan. 24.

ON the 25th of November the Plaintiff having declared as of Michaelmas term, was ordered to deliver, within a week, a further and better particular of demand. On the 3d of December the Defendant died. On the ninth, the particular not having been delivered, the Defendant's attorney, although no plea had been filed, signed judgment of *non pros*, which

Judgment of *non pros* cannot be signed for omission to deliver particulars pursuant to a Judge's order.

Jones Serjt. obtained a rule *nisi* to set aside, as irregular; a defendant not being entitled to sign judgment for want of a particular, nor after his own death.

Ludlow Serjt., who shewed cause, contended, that the irregularity being complete on the 2d of December, the judgment might be signed at any time after, notwithstanding the death of the party; and that omission to deliver a particular must be treated in the same light as omission to declare, the particular being, in effect, substituted for the declaration. In *Burgess v. Swayne* (a) Lord Tenterden said, "The defendant might have obtained a Judge's order for the delivery of the particulars within a given time; and then, if the particulars were not delivered within the time specified, he might have signed judgment." Unless some penalty be attached to the omission to deliver a particular, the Plaintiff will have no motive for delivering it.

Sed per Curiam. The judgment has been signed prematurely, and must be set aside. The penalty in-

(a) 7 B. & C. 485.

1882.

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CLARK.

curring by the Plaintiff for not delivering particulars is, the stay of his proceedings. In *Burgess v. Swayne* the plaintiff had omitted to declare in due time.

Rule absolute.

Jan. 24.

SELBY v. HILLS.

A petitioning creditor attending commissioners of bankrupt, is protected from arrest, *cundo morando et redeundo*.

If he shows that he is on his way home, it is for the party who arrests to prove a deviation.

GCOULBURN Serjt. obtained a rule *nisi* to discharge the Defendant out of custody, upon an affidavit that a commission of bankrupt having been issued at his instance, he, as petitioning creditor, attended the court of commissioners in *Basinghall Street* on the 30th of *December* to propose himself as an assignee, and to watch the proceedings; that he set off to return to his home (*Beckenham* in *Kent*) when the proceedings of the day concluded, and that he was arrested at the suit of the Plaintiff as soon as he had crossed *London Bridge*.

Jones Serjt. shewed cause, on an affidavit that the Defendant was not arrested till two hours after he had left the commissioners' court, nor till after he had called at several places in the city and *Westminster*, which were in a direction opposite to his residence. Upon which *Jones* contended, first, that a petitioning creditor attending commissioners of bankrupt had not such an interest in the proceedings as privileged him from arrest *cundo et redeundo*: Secondly, That the application should have been made to the Court of Chancery; for which he relied on *Ex parte List* (a), and *Kinder v. Williams* (b), where it was said, that the Court of King's Bench would not discharge a person in custody by process of the sheriff's

(a) 2 *Rose*, 24.(b) 4 *T. R.* 377.

court in a cause afterwards removed into that court, because he was arrested while attending commissioners of bankrupt to prove a debt. Thirdly, he contended, that at all events the Defendant could only be privileged in his direct course to and from the court, and not in unnecessary deviations.

1881.

SILK

v.

HALL.

Goulburn, in support of his rule, was requested to confine himself to the question of deviation, when he contended that the privilege from arrest having always been supported to a liberal extent, it was for the plaintiff to shew distinctly that the defendant had deviated from his course, and not to leave the Court to collect it by inferences from ambiguous premises. In *Lightfoot v. Cameron* (a) the defendant was allowed to dine unmolested; and in *Willingham v. Matthews* (b) *Gibbs C. J.* said, "With respect to the insolvent debtors' court being such a tribunal as to privilege a party from arrest, considering that it is a judicature created by the legislature, I think that parties attending the Court must be considered as privileged from arrest." The same principle was acted on with reference to arbitrators in *Spence v. Stuart*. (c)

TINDAL C. J. This rule must be made absolute. As to the first point, that the petitioning creditor on a commission of bankruptcy does not, when attending the commissioners, fall within the principle which exempts suitors from arrest while resorting to and returning from courts of justice, I think the objection is untenable, and that the defendant, as petitioning creditor, had as much interest in attending before the commissioners as a creditor attending the insolvent debtor's court to

(a) 2 W. Bl. 1113.

(b) 2 Marshall, 57.

(c) 3 East, 89.

1852.
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v.
MILL

oppose the discharge of a debtor. Then, as to the second point, I think this was the Court to which the defendant ought to apply, because the process was issued out of this Court, and we have a right to see that it is not improperly enforced. *Willingham v. Matthews* is a case in point.

The third is the only question which requires discussion, namely, whether in this case the privilege has been claimed *bonâ fide*, or only set up as a pretence to defeat a creditor. Now all the cases say that this privilege is not to be strictly scanned, and I think the affidavit of the Plaintiff does not sufficiently establish that the Defendant was abusing the privilege he claims. It appears that the Defendant was in a line leading to his home, and that throws upon the Plaintiff the labouring oar to shew that the defendant was there improperly. Although two hours had elapsed after he quitted the Court they might have been devoted to refreshment, and the calls, at which the Plaintiff does not depose he was present, might, compatibly with what is sworn, have taken place before the Defendant attended the commissioners.

PARK J. I have no doubt that the Defendant, when attending the commissioners' court, going thither, and returning thence, was entitled to the privilege of exemption from arrest. He had an interest in being present, and the bond he entered into as petitioning creditor requires that he shall cause the commission to be duly prosecuted. And it is equally clear that this is the court he ought to apply to to enforce the privilege. As to the alleged deviation from his direct route homewards, the privilege ought to be dealt out with a liberal hand. *Lightfoot v. Cameron* and *Willingham v. Matthews* are strong cases to that effect. In answer to an application of this kind the Court must be fully satisfied,
and

and not left merely to draw an inference, that the party was out of his direct course.

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SELBY
HILL

BOSANQUET J. I am of the same opinion. I think that the Defendant had a sufficient interest in attending the commissioners to protect him *eundo, morando, et redeundo*, and that this is the proper court to enforce his privilege. The only question is, whether or not he has abused that privilege. He is arrested two hours after he has left the commissioners, on the *Surrey* side of *London* bridge in a direct line towards his home. That circumstance calls on the Plaintiff, if he would vindicate the arrest, to shew clearly, and not by mere inference, how the two hours were disposed of by the Defendant.

ALDERSON J. It is clear that the Defendant, in attending the commissioners, must be considered as a party concerned in his own cause. And *Willingham v. Matthews* is decisive to shew that the application for discharge is properly made to this Court. Upon the last point I have not been without doubt. But I think the circumstance, that the Defendant was in a direct line towards his home, throws it upon the Plaintiff to account for the time which had elapsed before the arrest.

Rule absolute.

1831.

1831.

Jan. 27.

WOODCOCK v. NUTH.

Use and occupation. Defendant, who had occupied under a lease which expired at *Lady-day* 1829, paid a quarter's rent on *Midsummer* day 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rent was paid at irregular intervals by *L.*, who was in occupation for the ensuing two years: Held, that it was correctly left to a jury to find whether the lessor had accepted *L.* as a tenant, and the jury having found for Defendant, the Court refused to set aside the verdict.

USE and occupation. The Plaintiff sought to recover 25*l.* for two quarters' rent alleged to be due from the Defendant at *Lady-day* 1831.

At the trial before *Park J.*, *Middlesex* sittings after *Michaelmas* term, it appeared that the Defendant had held the Plaintiff's premises under a lease which expired at *Lady-day* 1829; that on *Midsummer-day* 1829, the last time he was seen on the premises, he paid 2*l.* 10*s.* for a quarter's occupation, over and above 10*l.*, which he was allowed to retain for repairs. Since that time rent had been paid at irregular periods by one *Lewis*, who occupied the premises.

The collector stated that *Lewis* paid on account of the Defendant, but assigned no reason for such statement. The Defendant, since *Midsummer* 1829, had resided at *Hammersmith*, a fact with which the Plaintiff was acquainted.

The learned Judge having left it to the jury to say whether the Plaintiff had accepted *Lewis* as his tenant, a verdict was found for the Defendant, which

Jones Serjt. moved to set aside on the ground of misdirection. The Plaintiff by proving the Defendant to have been in possession, and to have paid rent, shewed enough to raise a presumption of a yearly tenancy, and to cast on the Defendant the burthen of shewing by what means such tenancy had been determined: *Ward v. Mason*. (a) In *Harland v. Bromley* (b) it was held

(a) 9 Price, 291.

(b) 1 Stark. N. R. 455.

that

that where a defendant has been shewn to be in possession, the continuance of the tenancy is to be presumed until the contrary appears; and by *Bull v. Sibbs* (a) and *Harding v. Crethorn* (b) it is established that for the purposes of an action by the lessor, the occupation of an under-tenant is the occupation of the lessee.

A rule nisi having been granted,

Wilde Serjt. shewed cause. The evidence is not sufficient to raise a presumption that the Defendant is tenant. From the circumstance of his having made a payment on a precise quarter day, and having never been on the premises since, the presumption is rather the other way. In *Freeman v. Jewry* (c), *A.* being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of his interest; the plaintiff afterwards took a lease of the same premises, expectant on the determination of *A.*'s term; and the defendants, after the determination of *A.*'s term, continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises; and it was held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. In *Ward v. Mason* the only question was, whether there were any facts to go to the jury in discharge of the defendant. In the present case the occupation and payment by *Lewis*, coupled with the absence of the defendant, were sufficient to warrant the direction of the Judge and the finding of the jury. In *Harland v. Bromley* it did not appear that the defendant was out of possession.

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(a) 8 T. R. 327.

(b) 1 Esp. 57.

(c) 1 M. & M. 19.

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Jones. In *Freeman v. Jewry*, the defendants had claimed to give up the possession at the end of the term, and the premises remained unoccupied. So in *Hall v. Burgess (a)*, a tenant, who paid rent half yearly, having quitted at the end of a year, and the landlord having relet the premises to a new tenant before another half year expired, it was held he could not recover from the old tenant for the interval between his quitting and the entry of the new tenant. But here the Defendant is shewn to have been in possession and to have paid rent; and there is nothing to shew that *Lewis* was not his servant or under-tenant, or that the Plaintiff had accepted *Lewis* as tenant instead of the Defendant.

TINDAL C. J. There is no reason for setting aside this verdict. It is not necessary to determine whether at the expiration of his term *Nuth* became tenant from year to year. Assuming that he did, which is the most favourable supposition for the Plaintiff, the question is, whether there was any evidence of a new tenancy. The Plaintiff contends there was none; but I think there was enough to be left to a jury, and to warrant the conclusion they have drawn.

The premises in question were originally let to *Nuth*, and at *Midsummer-day* 1829, precisely a quarter after his term had expired, he paid a quarter's rent, deducting 10*l.* for certain repairs. That is the only time he has been seen on the premises, since the term expired, and the rent has never since been paid upon the precise quarter-day. What is the reason of this difference? It is natural that, during the continuance of a tenancy, the lessor should not be rigid to exact payment on the precise day when it becomes due; it is natural that,

(a) 5 B. & C. 332. See also also *Bishop v. Howard*, 2 B. & C. 100.

when the parties come to a settlement upon the tenant's quitting, the settlement should take place upon a quarter day. It is also to be observed, that *Nuth*, ever since the payment in question, has lived at *Hammersmith*, and that all the subsequent payments have been made by *Lewis* or his wife. It is true the witness says he received them on account of *Nuth*, but he gives no reason for such an assertion, which seems to have been no more than an inference of his own. That being so, and no application having been made to *Nuth*, although the landlord knew he was living at *Hammersmith*, I cannot say there was not evidence to go to a jury that *Lewis* was really the tenant.

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BOSANQUET J. I am of the same opinion. The case has gone to the jury with the consent of the Plaintiff's counsel, and the question is, whether there was reasonable evidence to support the verdict; the Plaintiff insisting that *Nuth* was his tenant during the time for which rent has been demanded. No doubt, payment of rent is *prima facie* evidence of a continuing tenancy, but it is evidence which may be rebutted; and what are the facts here? *Nuth* makes a payment of rent, deducting something for repairs, at a precise quarter day; and it must be taken that he quitted the premises on that day, for he is never seen there afterwards; but the business of a publican is from that time carried on in the premises by *Lewis*, who pays the rent for four successive quarters. During this time *Nuth's* residence was known to the Plaintiff, and yet he was never applied to. As to the collector's saying that he received the rent on the account of *Nuth*, that appears by the learned Judge's report to have been his own inference; and not a statement grounded on any fact within his knowledge.

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ALDERSON J. If this case depended on the principle said to have been laid down by Lord *Tenterden* in *Freeman v. Jewry*, I should pause before I gave it my assent. But it is not necessary to decide that point; for though under some circumstances a man may become tenant by act of law, the lessor may afterwards accept another tenant in his stead. The Plaintiff's case here rests altogether on the testimony of the collector, to which the jury were entitled to give what degree of credit they chose. He thought fit to append to his statement of the receipt of rent the qualification, that he received it on account of *Nuth*. The jury might believe the payment, and yet see grounds to disbelieve the qualification appended by the witness.

PARK J. There is great weight in the circumstance, that the last time *Nuth* paid rent it was on the exact quarter day; that he was never afterwards seen on the premises, and that the payments of *Lewis* were at irregular periods. The allegation of the collector, that the money was received from *Lewis* on account of *Nuth*, was merely his own inference, unsupported by any fact which he could mention.

Rule discharged.

Jan. 25.

CANTWELL v. Earl of STIRLING.

It is no ground for a plea in abatement, that a Defendant, sued as a

Scotch peer, is also described as having privilege of parliament.

TO an action on a bill of exchange, the Defendant pleaded as follows:—

And the Right Honourable *Alexander* Earl of *Stirling* and *Dovan*, of that part of the United Kingdom of

Great

Great Britain and Ireland called Scotland, — whom the Plaintiff by his said declaration admits to be Earl of *Stirling and Doan*, but alleges, that he, the said Plaintiff, sued out his original writ against him as *Alexander Humphreys Alexander*, calling himself Earl of *Stirling*; and against whom the Plaintiff has thereupon declared as the Right Honourable *Alexander Alexander* Earl of *Stirling and Doan*, having privilege of Parliament, — comes and defends the wrong and injury, and prays judgment of the same writ and declaration thereon founded, because, he says, that he now is, and before and at the time of suing out the said writ was and from thence hitherto hath been Earl of *Stirling and Doan*, of that part of the United Kingdom of *Great Britain and Ireland called Scotland*, and entitled to and has and had privilege of peerage; but he further says that he has not, nor had he on the day of suing out the said writ, or at any time since hitherto privilege of parliament, as by the declaration is above supposed; and this he is ready to verify. Wherefore he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed.

Demurrer and joinder.

Merewether Serjt. in support of the demurrer. A plea of peerage ought to shew in what manner the peerage was created; and, if the Defendant was not the first peer under that creation, the mode in which the peerage came to and vested in him; but this plea does not even contain any distinct or positive allegation that the Defendant was or is a peer of *Scotland*. And the Defendant cannot plead in abatement of the writ, or of the declaration in respect of the form of the writ, without craving oyer of the writ. The allegation that the Defendant has privilege of parliament is mere surplusage. And the assertion in the plea, of the Defendant's

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title to privilege of peerage, and the denial of his privilege of parliament makes the plea double.

Spankie Serjt. contra. This is rather a plea of misnomer in title of dignity than a plea of peerage. It is beneath the Defendant's dignity to treat him as having privilege of parliament only. Privilege of peerage is of a higher nature. Thus, if a defendant be named baronet only, where he is knight and baronet, he may plead it in abatement. *Com. Dig. Abatement (F)*, 19.

TINDAL C. J. In this case the Defendant has been impleaded by his proper name of dignity, and has been brought into court by the proper process; but he sets up as ground of complaint that he is described as having privilege of parliament, and contends that he ought to be described as having privilege of peerage. And the question is, whether those words may not be rejected as surplusage. No authority has been adduced to shew that in a case like this the words "having privilege of peerage," are necessarily to be inserted in the declaration. In order to prevent a party from being sued a second time for the same cause of action, the law provides that he shall be sued by his proper title, and so be enabled to produce the judgment against him in bar of another suit. He may, therefore, plead misnomer when sued by the wrong Christian or surname, and may object to the misdescription if sued by a wrong title of dignity. The Defendant, however, proposes to go further than that, and complains of a misstatement in what is mere matter of addition. But at least it should appear that the addition in question is material; for it is laid down in *Com. Dig. (a)*, "If the defendant be named *A. B. of P.*, he may say that

(a) *Abatement*, F. 22.

he is *A. B.* of *D.*, and not of *P.* So, if he be named *A. B., smith*, he may say he is *A. B., carpenter*, and not *smith*. But if the addition be immaterial, a mistake cannot be pleaded in abatement: as, in an action against *A. B.*, citizen of *Y.*, one of the company of *M.*, it is no plea that he was not of the company; or against *J. M.*, attorney of *Peter de Medicis*, it is no plea that he is not his attorney; or against *A. M., dominam de B.*, when she is not a lady." These are cases of mere idle description, the name of itself being sufficient to distinguish the defendant. In like manner, and for the same reason, we may throw out of the declaration here the words "having privilege of parliament."

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PARK and BOSANQUET Js. concurred.

ALDERSON J. The real question is, Whether these additions constitute any part of the name. By the authorities which have been referred to it is plain that, when immaterial, they are considered no part of the name, and may be rejected as surplusage. There must, therefore, be judgment of

Respondent ouster.

Same v. Same.

Jan. 31.

PURSUANT to the above decision, judgment of *respondent ouster* was signed by the Plaintiff in this cause, and notice thereof given to the Defendant's attorney on the 25th of January.

A party has in general four days' time to plead after judgment of *respondent ouster*.

On the 27th, at six in the afternoon, the Plaintiff signed judgment for want of a plea.

At eight on the same evening the Defendant filed a

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plea

1832. plea of *non-assumpsit*, and now moved to set aside the
 Same last judgment for irregularity, contending that he had
 v. four days' time to plead after the judgment of *respondent*
 Same. *ouster*.

Merewether Serjt. opposed the motion on an affidavit which stated that the last judgment had been signed under the advice of an officer of the Court, and that the action was brought on a bill of exchange due May 31. 1831, being a renewal of a previous bill dishonored by the Defendant. At all events the Defendant should have applied for time to plead, as he was bound to plead *instantly*, having delayed the Plaintiff by a nugatory plea in abatement. But

The Court thought that in general after judgment of *respondent ouster*, the party has four days to plead, and made the rule

Absolute without costs.

Jan. 23. DOE dem. PEARSON v. RIES and KNAPP.

"Sept. 21. THE lessor of the Plaintiff sought to obtain pos-
 1829. session of certain premises in the *Strand* by virtue
 "K. agrees of the following
 to let, and P. "Memorandum of an agreement made this 21st day
 to take, a of September 1829, between Messrs. John, James, William,
 house in its unfinished
 state, for the term of sixty years, being the whole term that K. has the same leased to him, at the
 rent of 52*s*l. payable quarterly, the first payment to be made for the half quarter at
Christmas next; P. to insure the premises, and to have the benefit of an insurance
 lately paid: a lease and counterpart to be prepared at the expense of P., and to contain
 all the clauses, covenants, and agreements K. entered into in the lease granted to him:"
 Held, an actual demise, and not a mere agreement for a lease.

and

and *Henry Knapp*, of *Cirencester Place* and *Foley Street*, in the parish of *St. Mary-le-bone*, and county of *Middlesex*, builders, on the one part, and *Mr. William Pearson*, of *London Wall*, in the city of *London*, auctioneer, on the other part.

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“ The said *John*, *James*, *William*, and *Henry Knapp* agree to let, and the said *William Pearson* agrees to take, all that house and premises, exhibition-room, vaults, and cellars, in the unfinished state they are now in, situate on the south side of the *Strand*, and known as numbered 101 and 102, the same being in depth from the *Strand* to *Fountain Court*, and in the parish of *St. Clements Danes*, and county aforesaid, for the term of sixty years, or thereabouts ; being the whole term that they the aforesaid *John*, *James*, *William*, and *Henry Knapp* have the same premises leased unto them ; at the yearly rent or sum of 525*l.*, clear of the land-tax, sewers rate, and all other rates, taxes, and assessments whatsoever, that now are or may be hereafter imposed by act of parliament or otherwise, whether parliamentary or parochial ; the said rent to be paid quarterly on the four most usual days of payment of rent ; the first payment to be made for the half quarter at *Christmas* next. The said *William Pearson* also agrees to insure the whole of the premises in the *Westminster Fire Office* in the sum of 5000*l.*, in the joint names of *William Pearson* and *John*, *James*, *William*, and *Henry Knapp*, or such other name or names as they may appoint. The said (a) lease and counterpart to be prepared by the attorney of the said *John*, *James*, *William*, and *Henry Knapp*, and at the expense of the said *William Pearson*, and to contain all the clauses, covenants, and agreements that they the said *John*, *James*, *William*, and *Henry Knapp* have entered into and agreed upon in the lease granted unto them of the aforesaid premises.

(a) *Sic.*

N 4

“ Mr.

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"Mr. *Pearson* to have the benefit of the insurance which has been lately paid, without any charge or expense to himself for the same. In witness whereof the aforesaid parties have hereunto set their hands the day and year first above named.

W. Pearson.

J., J., W., and H. Knapp."

At the time of the agreement the *Knapps* had mortgaged the premises. They were partly unfinished, and stood in need of considerable repairs, and the lessor of the Plaintiff was let into immediate possession, to finish them at his own expense.

The Defendants resisted the action on the ground that the above instrument was only an agreement for a lease, and not a demise *per verba de præsenti*; and a verdict having been obtained for the Plaintiff at trial before *Tindal C. J.*, *Middlesex* sittings after last term,

Storks Serjt. obtained a rule *nisi* to set it aside on the ground urged at the trial.

Wilde Serjt. (*Bompas* Serjt. was with him) shewed cause, and relied on the stipulation to pass the whole of *Knapp's* term upon the covenants under which they themselves held it, coupled with the words "agree to let and agrees to take," as indicating an intention that an immediate interest should pass; when the Court called on

Storks, (*Stephen* Serjt. was with him,) to support the rule. They cited *Goodtitle d. Estwicke v. Way* (a), *Doe d. Coore v. Clare* (b), *Morgan v. Bissell* (c), *Poole v. Bentley* (d), *Tempest v. Rawlings* (e), *Hamerton v. Stead* (g),

(a) 1 T. R. 735.

(b) 2 T. R. 739.

(c) 3 Taunt. 65.

(d) 12 East, 168.

(e) 13 East, 18.

(g) 3 B. & C. 478.

Dunk

Dunk v. Hunter (a); but the point in question having been so repeatedly and recently discussed, (see *Staniforth v. Fox* (b), where all the authorities are collected,) it would be superfluous to state more than that the stipulation for a lease, of which the covenants were undefined, — and for the payment of only half a quarter's rent at *Christmas*, though the agreement bore date *September 21st*, — and the circumstance of the *Knapps'* having mortgaged the premises, — were relied on, as shewing an intention that an immediate interest should not pass.

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TINDAL C. J. Both on the form of the instrument itself, and on the authority of decided cases, I think this agreement is not executory, but conveys a present interest to the lessor of the Plaintiff. Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties. The instrument in question undoubtedly does contain a stipulation for a future lease and counterpart, and that rent shall not be paid for the first half quarter after the date of the instrument. Those are the points chiefly relied on by the Defendants. The lessor of the Plaintiff contends that the instrument contains words which have been decided to be words of present demise (c); that the agreement for a future lease is not incompatible with a present demise (d), particularly where, as in the present case, the party is let into immediate possession, although no precise day is mentioned from which rent is to commence.


(a) 5 B. & A. 322.

(b) 7 Bingb. 590.

(c) See *Staniforth v. Fox*,
7 Bingb. 590.

(d) *Doe dem. Walker v. Groves*, 15 East, 244. *Barry v. Nugent*, cited in *Roe v. Ashburner*, 5 T.R. 165.

First,

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First, then, as to the stipulation for a future lease. In all the cases in which such a stipulation has been held to render the agreement containing it executory, the terms of the future lease have been unascertained at the time of entering into the agreement, whereas here, the future lease is to be prepared by the attorney of the Defendant *Knapp*, and to contain "all the clauses, covenants, and agreements that they, the *Knapps*, have entered into and agreed upon in the lease granted to them of the aforesaid premises:" clauses, therefore, which were either in the possession of the *Knapps*, or, at least, within their knowledge. This agreement for a future lease, therefore, leaves nothing uncertain, and does not fall within the principle of those cases which have held an agreement with a clause for a future lease executory, on the ground of present uncertainty.


The next point is, that no precise day is fixed from whence the rent is to commence. If that had been left quite uncertain, there might, perhaps, have been some ground for contending that the lessor of the plaintiff took no interest in the premises till the time when rent was to accrue. But taking all the circumstances of the case together, the observation rather makes the other way. For on the execution of the agreement at the end of *September* the party is put into immediate possession of premises requiring considerable repairs, and at the *Christmas* following he is to pay half a quarter's rent. We cannot but infer from this that he was to be excused paying any rent for the half quarter which he would probably be obliged to devote to repairs, and during which, consequently, he would have no enjoyment of the premises.

Now, what are the arguments on the other side? "*Agrees to let and agrees to take,*" have been held words of present demise from the case of *Goodtitle d. Estwicke v. Way* to the present time. Then, the party is

is put into immediate possession; and what circumstance can guide us with more certainty to the conclusion that it was intended to pass an immediate interest? If the landlord meant that the instrument should be only executory, at least by giving possession, he furnishes the strongest evidence the other way. But there are other circumstances to lead us to the same conclusion. The premises were unfinished; the tenant was to put them in repair. If the agreement were only executory, the landlord might exclude the tenant before he had derived any benefit from the expense incurred; a risk to which no prudent person would be likely to expose himself. Then, there is a stipulation that the tenant is to insure, and to have the benefit of an insurance lately made. What does that shew, but that, as he takes the former insurance, he is to be responsible for the premises from the time of the transfer; and he could only be called on to be so responsible on the supposition of his taking an immediate interest. There is, indeed, good reason to contend, that the agreement was meant to be an absolute assignment of all the interest the *Knapps* had in the premises.

It was, at all events, a legal demise, with a right to immediate possession, and, therefore, the rule which has been obtained on the part of the Defendants, must be discharged.

PARK J. The intention of the parties must be collected from the instrument they have executed, and looking at that, as far as the term is concerned, there seems to have been an intention to assign it. But the lessor of the Plaintiff was to complete the premises, and to have the benefit of an insurance already effected, and those circumstances, taken together, are almost conclusive to shew an intention to pass an immediate interest. I refrain from going into the cases, because we have so recently

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recently considered them in *Pinero v. Judson* (a) and *Staniforth v. Fox*, where they were all collected. In *Roe dem. Jackson v. Ashburner* (b) Ashhurst J. said, "I entirely agree to the position, that whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties; which must be collected from the words of the agreement, and from collateral circumstances. Where the words are *de presenti*, 'I demise, &c.,' or an agreement that 'the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter is strong evidence to shew that the landlord intended to give a present interest." That is the ground on which we decide here. If these be words of present demise, it is immaterial whether the instrument be called a lease, an agreement, or a memorandum of agreement. In *Goodtitle d. Estwicke v. Way*, the duration of the term was not settled, nor the covenants of the lease. In *Doe d. Coore v. Clare* the lessor had no power to grant a lease. In *Tempest v. Rawlings* the covenants for the future lease were not ascertained, and the party was not let into possession; but *Poole v. Bentley* is not distinguishable from the present case.

BOSANQUET J. I am of the same opinion. The question is, whether it was the intention of these parties that the lessor of the plaintiff should take an immediate interest, or wait till the execution of a future lease. However desirable it may be to find some certain criterion for ascertaining the intention of parties upon such occasions, the difference between instruments is so great that none such has yet been discovered. The

(a) 6 Bingb. 206.

(b) 5 T. R. 163.

stipulation

stipulation to grant a future lease has been considered insufficient for that purpose, for though a circumstance to be looked at, it is of itself inconclusive. The language adopted in the present instrument has always been held to import a present demise, and that inference is borne out by the acts of the parties. The lessor of the plaintiff takes a large unfinished house at a considerable rent; he enters immediately, and at the end of the first quarter is to pay only half a quarter's rent: but nothing is more common than an abatement out of the first payment of rent, where the tenant is to begin by laying out money on the premises. Then, the transfer of the existing assurance could scarcely have been agreed on if the tenant was not to take an immediate interest in the premises. And there is no validity in the objection that the covenants in the future lease were left uncertain, for it was to contain the same covenants as that which the *Knapps* either had in their possession, or had the means of referring to.

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ALDERSON J. There is nothing in the circumstance that the rent was not to commence from the date of the agreement. It is accounted for by the fact, that the lessor of the Plaintiff was to complete an unfinished house; and it was the obvious intention of the parties that an allowance should be made for the time during which he should have no useful occupation.

It would be most unjust to hold, that on this account the immediate interest did not pass; for, if that were so, the party might incur expense in repairs, and then be deprived of the fruits.

There are many parts of the agreement which go to shew an intention to pass an immediate interest, and there is nothing but the stipulation for a future lease that has an aspect the other way. A stipulation to that effect, however, has been holden to shew an intention of giving

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giving further security, but not of deferring the interest to be acquired, unless where the terms of the future lease are left in uncertainty. Here the terms of the lease may be said to be comprised within the four corners of the agreement; for reference is there made to a lease in the possession of the grantors, the terms of which are to be transferred to the lease to be granted to the lessor of the Plaintiff.

Rule discharged.

Jan. 25.

ANTHONY v. HANEYS and HARDING.

Trespass for entering Plaintiff's close.

Plea, that certain goods of Defendants' were there, and that they entered to take them, doing no unnecessary damage:

Held, ill.

TRESPASS. The declaration stated, that Defendants, on the 8th of November 1830, and on divers other days &c. between that day and the commencement of the suit, broke and entered Plaintiff's close at *Much Haddon* in the county of *Hertford*; and with feet in walking trod down, trampled upon, and consumed and spoiled Plaintiff's grass, and with cattle and wheels of divers carts, &c. crushed, damaged, and spoiled other grass; and with the feet of the cattle and the wheels of the carts subverted, &c. the earth and soil of the close, and then and there put, placed, and laid down divers quantities, to wit, 5000 bricks, &c. in and upon the said close, and kept and continued the same without the leave or license and against the will of the Plaintiff, and thereby greatly encumbered the close, and pulled down, prostrated, and destroyed one barn, three outhouses, and three leantos of Plaintiff, and in so doing dug up and subverted the earth, and made divers holes therein, and seized, took, and carried away the materials of the said barn, outhouses, and leantos.

There

There was a second count for seizing, taking, and carrying away a cart, and divers goods and chattels of Plaintiff; and a third count, for breaking and entering a certain other barn, outhouses, and leantos of Plaintiff, &c.

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Plea, first, the general issue, on which issue was joined; second, that before and at the said times when, &c. in the said first count mentioned, the Defendant *John Haney* was the owner of and entitled unto a certain barn, three outhouses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5000 planks of wood, 5000 joists, 5000 ties, 5000 girders, 5000 pieces of wood, 5000 loads of timber, and 1000 weight of iron, of great value, to wit, of the value of 200*l.* then respectively standing and being in and upon the said close of the said Plaintiff in which, &c.; wherefore the said Defendant, *John Haney*, in his own right, and *James Haney* and *Joseph Harding*, as the servants of the said *John Haney*, by his command, at the said several times when, &c. in the said first count mentioned, entered into and upon the said close in which, &c. in order to pull down, remove, take, and carry away the said barn, outhouses, and leantos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, outhouses, and leantos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, waggons, and other carriages drawn by the said cattle, from and out of the said close in which, &c., and in so doing, they, the said Defendants, at the said several times when, &c. in the said first count mentioned, did necessarily and unavoidably with their feet in walking, a little tread down, trample upon, consume, and spoil a little of the grass there then growing and being, and did, with the wheels of the said carts, waggons, and other

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other carriages, a little crush, damage, and spoil other the said grass there also growing, and with the feet of the said cattle, and with the wheels of the said carts, waggons, and other carriages did a little subvert, damage, and spoil the earth and soil of the said close, and did necessarily and unavoidably put, place, and lay in and upon the said close in which, &c. the said bricks, tiles, wood, and rubbish in the said first count mentioned, being part of the materials of the said barn, outhouses, and lean-tos, and there keep and continue the same for a short time, to wit, until the same could be put in the said carts, waggons, and other carriages to be removed from the said close, doing no unnecessary damage to the said Plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned. Demurrer and joinder.

Stephen Serjt. was to have argued in support of the demurrer, but the Court called on

Dompas Serjt. to support the plea.

Although, without licence or lawful warrant, a man cannot enter the house of another, because every man's house is his castle, yet he may enter the close of another to recover his own goods, provided he be guilty of no breach of the peace; and the authorities, if any, which militate against this position are founded on a misconception or misapplication of the case of *Taylor v. Friskin* (a), where a plea that the defendant entered the plaintiff's house by leave of his wife, to take goods sold to him by the wife, was held ill. But with regard to a

(a) *Cro. Eliz.* 246. See also *Holdingsbaw v. Rag*, *Cro. Eliz.* 896. as to license by a servant; and *Higgins v. Andrews*, 2 *Roll. Rep.* 55.

close,

close, supposing goods to be lawfully on it, — and it is not to be *assumed* that they are there unlawfully, — the owner of the close is bound to permit the owner of the goods to enter and take them: he enters, therefore, under an implied licence. In the present case the demurrer admits that the barns and outhouses belonged to the Defendant, and the Plaintiff not having averred that they were affixed to the freehold or unlawfully on the close, it must be taken that they were chattels, and lawfully there. Now, if trees be blown down, it is no trespass for the owner to enter the land into which they fall, to take them: *Millen v. Hawery* (a), *Vin. Abr. Tresp.* H. a. 2. So, if a fruit tree grow in a hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it. *Vin. Abr. Tresp.* L. a. So, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, he may justify the felling of it upon the other's land; *Dyke v. Dunstan*. (b) In like manner he may justify chasing sheep upon another's ground if he cannot otherwise drive them off his own. *Millen v. Fandry*. (c) There, "the point singly was but this; I chase the sheep of another out of my ground, and the dog pursues them into another man's land next adjoining, and I chide my dog; and the owner of the sheep brings trespass for chasing them: and it was argued by *Whistler*, of *Gray's Inn*, that the justification was not good, and he cited *Co. lib.* 4. 58. b. that a man may hunt cattle out of his ground with a dog, but cannot exceed his authority; and by him an authority in law which is abused is void in all; and to hunt them into the next ground is not justifiable. But per *Crew C. J.* It seems to me that he might drive the sheep out with the dog, and he

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(a) *Latch.* 13.(b) 6 *Ed.* 4. 18.(c) *Popb.* 161. See *Sutton*v. *Moody*, 1 *Ld. Raym.* 250.*Churchward v. Studdy*, 14 *East*,

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could not withdraw his dog when he would in an instant, and therefore it is not like to the case of 38 E. 3., where trespass was brought for entering into a warren, and there it was pleaded that there was a pheasant in his land, and his hawk flew and followed it into the plaintiff's ground, and there it seems that it is not a good justification, for he may pursue the hawk, but cannot take the pheasant. 6 E. 4. A man cuts thorns, and they fall into another man's land, and in trespass he justified for it; and the opinion was, that notwithstanding this justification trespass lies, because he did not plead that he did his best endeavour to hinder their falling there, yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them out of his own land, and he did his best endeavour to recall the dog, and, therefore, trespass does not lie." The same principles are laid down in *Com. Dig. Pleader*, 3 M. 42. In the Year Book, 17 H. 6. it is said to be a lawful cause to enter a man's park, to shew him evidence to avoid a suit. In all such cases the defendant may be said to have a sort of way of necessity: as where he pursues goods which have been stolen. So, where a common highway is out of repair by the overflowing of a river or other cause, passengers have a right to go upon the adjoining land... *Absor v. French* (a), *Henn's case*. (b). Or, if A. makes a lease for years, excepting the trees which he would afterwards sell, the law gives the lessor and those who would buy power to enter and look at the trees, for without sight none would buy, and without entry none would see, *Lifford's case*. (c). And a man may enter the land of another to abate a nuisance, *Com. Dig. Pleader*, 3 M. 38.

If the defendant have no right to enter, he may be

(a) *Shaw*, 28.

(b) *Sir W. Jones*, 296.

(c) 11 *Rep.*, 52 a.

without

without remedy, for peradventure upon his demanding the goods the plaintiff may decline to make answer, or in anywise to stir in the affair, and without refusal on the part of the plaintiff as well as demand on the part of the defendant, trover will not lie.

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TINDAL C. J. The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued to-day. The Defendant *Haney* states, as the ground of his right for entering the Plaintiff's close, that he was the owner of a certain barn, three outhouses, three lean-tos, and certain chattels standing and being on the Plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, lean-tos, &c. were standing on the close in the ordinary acceptation of the term, that is, were affixed to the freehold; and the rather, because the Defendant admits that he dug up the soil of the Plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the Plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the Defendant has shewn on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shewn the circumstances under which his property was placed on the soil of another. Here the Defendant has confined himself to the statement that they were there, without attempting to shew how. To allow such a statement to be a justifi-

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fication for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the Defendant. And first, that of fruit falling into the ground of another: that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbour, the owner may enter and take it. But the distinction is taken by *Latch*, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken, and the owner pursues to obtain possession, the principle is laid down by *Blackstone* (a), who says, "As the public peace is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society." If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy where the

(a) 3. Comm. 4.

occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.

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PARK J. I am of the same opinion. The distinction is clearly laid down by *Blackstone* in the case of goods feloniously taken, who says, "If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use;" but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." Upon these pleas it rather appears that the property claimed by the Defendant was attached to the freehold, than that it was a chattel in the nature of a Dutch barn, for it is admitted that he dug holes in order to remove it. The Defendant is not, as it has been contended, without remedy, for he might sue in trover after a proper demand, and if his application were met with continued silence, the jury might from that presume a conversion.

BOSSAQUEZ J. I am of opinion that this plea is no answer to the trespass with which the Defendant is charged. It is put broadly and nakedly that the Defendant has a right to enter the soil of another to take his own property without shewing the circumstances under which it came there. The case has been argued on the ground of necessity; but on that ground, at least the necessity should be shewn. There are, no doubt, various cases in which it has been held that the party is entitled to enter, but in all of them the peculiar circumstances have been stated on which the party has rested

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his claim to enter. It would be too much to infer that the party may enter in all cases where his goods are on the soil of another, because he may enter in some where he shows sufficient grounds for so doing.

ALDERSON J. I am of the same opinion. The difficulty suggested as to an action of trover, would apply to all cases of trover where a demand is necessary.

Judgment for Plaintiff.

Jan. 27.

In the Matter of PAYNE, a Prisoner.

A prisoner brought up under the compulsory clause of the Lords' Act, allowed time, on an allegation that he had petitioned the insolvent debtors' court.

ANDREWS Serjt. had moved to proceed against the prisoner under the compulsory clause of the Lords' Act, when the Court gave time, upon the prisoner's alleging that he had petitioned the insolvent debtors' court.

He was now brought up again, and *Andrews* renewed his application, on the ground that the insolvent debtors' court had rejected the prisoner's petition.

It appearing, however, that the petition had been rejected for informality only, the prisoner prayed for further time; whereupon, *Andrews* contended, that the jurisdiction of this Court was not superseded by that of the insolvent debtors' court; and if the prisoner had further time allowed him, he might omit to proceed in the insolvent debtors' court, and so defeat the creditors altogether.

Sed per Curiam. If the prisoner is fairly endeavouring to make a distribution of his funds among all his creditors, we ought, in the exercise of a judicial discretion, to allow him further time.

1832.

MOUNT v. LARKINS.

Jan. 30.

THE questions to be tried in this cause were, the seaworthiness of the ship *Aguilar*, and whether a voyage on which she had been insured had been entered on without unreasonable delay.

The cause was appointed for trial on the 28th of October 1829, but was not tried till the 22d of April 1830, when a verdict was found for the Plaintiff; but a rule was obtained for a new trial on the question of seaworthiness, and a special case was argued on the question of unreasonable delay. Judgment upon the latter question having been given on the 25th of November 1831 in favour of the Defendant, (see *ante*, 108), it became unnecessary for him to proceed to a new trial.

Watson, the captain of the ship, had been subpoenaed by the Defendant on the 6th of October 1829, to give an account of the delay in the voyage, one of the points on which the Defendant rested his case. And upon the taxation of costs the Defendant claimed 219*l.* paid by him to *Watson*, for his subsistence from the 6th of October 1829 to November 25, 1831, alleging, that *Watson* had been detained after the trial in April 1830, to secure his attendance upon the new trial, for which a rule absolute had been obtained; and that in the beginning of 1831, he had refused an offer of employment in the merchant service in consequence of this detention.

The Plaintiff objected to the sum claimed for *Watson*, on the ground that he had not come from a place where he was out of the reach of a subpoena, but had, during the whole time in question, been living at *Hackney*; that he was an officer in the royal navy, receiving half-pay, and not allowed to engage in the merchant service with-

Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness, from the time of subpoena to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not shew the permission of the admiralty for him to engage in the merchant service.

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out express permission from the Admiralty; and that, though in attendance, he had not been examined on the trial of the cause.

The prothonotary allowed 94*l.* for the expense of *Watson's* subsistence from *October* 6. 1829 to the time of the trial, *April* 22. 1830; whereupon, a rule was obtained on the part of the Plaintiff to reduce that sum, and on the part of the Defendant to increase it.

Taddy Serjt. urged the reduction. The Defendant had no right to detain a witness for such a length of time at the expense of the other party, upon the mere speculation that the Court might order a new trial, especially when he was not examined on the first trial. And the witness here being a half-pay officer, and having the means of subsistence, was not entitled to anything even for the time that elapsed before the trial. He cannot claim for loss of employment in the merchant service, since it is illegal for him to enter into that service without the express consent of the Admiralty. That distinguishes the present case from that of *Loneragan v. Royal Exchange Assurance (a)*, and *Berry v. Pratt (b)*, where the witness, by his attendance on the cause, was deprived of his only means of subsistence. The witness, too, might have been examined on interrogatories.

Wilde Serjt., in support of the increase, relied on the affidavit stating the witness to be a material and necessary witness, and on the recent decisions of *Loneragan v. Royal Exchange* and *Berry v. Pratt*. According to the former of those cases, the party was not bound to examine upon interrogatories where the appearance of the witness at the trial was likely to be more beneficial. If

(a) 7 *Bingh.* 725.

(b) 1 B. & C. 276.

the party was justified in detaining the witness for the first trial, he was equally justified in detaining him for the second. The necessity for putting him into the box must depend upon the accidents of the trial; but that did not lessen the necessity for having him ready.

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TUDAL O.J. It seems to the Court that there is no sufficient reason for reviewing the prothonotary's taxation on the one side or the other. As to the motion to reduce the sum allowed the witness, or to refuse him anything, there is no reason for doubting that he was a material witness; (a point upon which the Court ought not to speculate too nicely, when there is a fair and reasonable ground for coming to such a conclusion;) — and if so, the prothonotary is the proper officer to determine the *quantum* of allowance. In the case of *Berry v. Pratt*, the Court of King's Bench confirmed an allowance for the subsistence of a common mariner; and although the witness here was a master in the royal navy, he was in the habit of obtaining employment in the merchant service, and his case cannot be distinguished from that of the mariner. On the other hand, we see no reason for increasing the sum which has been allowed. It has been contended, that it was necessary to detain him till the result of a motion for a new trial should be known; but very early in that proceeding the Court intimated that the new trial should be confined to the question of seaworthiness, a point to which the Defendant did not propose to examine the witness. There is no ground, therefore, for sending the case back to the prothonotary; and the circumstance that both parties complain on opposite grounds, is, in some degree, an indirect proof that the prothonotary is right.

Rule discharged.

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Jan. 31.

ELTON v. LARKINS.

The announce-
ment in the
foreign lists
filed at
Lloyd's of the
sailing of a
ship out of the
port from
which she is
insured, does
not, where
such commu-
nication is ma-
terial, dispense
with the
assured's dis-
closing a letter
received from
his captain
before the
policy is
effected, an-
nouncing the
day of his
intended
departure.

ON the 29th of *December* 1828 the Plaintiff's broker effected a policy of insurance on the brigantine *Fanny* from *Cadiz* to *London*, with leave to touch at *Exmouth*, at 30s. per cent. premium.

On the 17th of *December*, the Plaintiff had received a letter from the Captain of the *Fanny*, dated *Cadiz*, *November* 21st, stating that the *Fanny* was nearly loaded; would probably sail for *London* the next day, and that the schooner *Traveller* had sailed for *London* on that day.

This letter was not communicated to the underwriter.

But in *Lloyd's List* of *December* 20th it was announced that the *Traveller* had been towed into *Kingsale* in distress, and that the ship *William* which had left *Cadiz* on the 30th of *November*, had arrived at *Graveyard*.

On the 22d of *December* a printed list from *Cadiz* was received and filed in the inner room at *Lloyd's*, containing the words following:—"25, Nov., bergantin *Fanny*, John Taylor, para *London*."

The voyage from *Cadiz* to *London* varies from sixteen to sixty days, but the average length is twenty-one.

The *Fanny* never having been heard of, the Plaintiff sued on his policy, and at the trial before *Busanquet J.*, *London* sittings after *Trinity* term, the defence set up was, that letter received by the Plaintiff on the 17th of *December* from his captain at *Cadiz*, was a material communication, and ought to have been disclosed to the underwriter. Evidence was given that though underwriters are in the habit of referring to the announcements in *Lloyd's* books, and the *English* lists printed from

from them, they do not, except under peculiar circumstances, resort to the foreign lists which are filed in that establishment: that if the time of sailing of the *Fanny* had been known, in conjunction with the fact that the *Traveller* had arrived at Kinsale, and the *William* at *Gravesend*, by the 20th of *December*, after leaving *Cádiz* on the 21st of *November*, or later, the *Fanny* would have been deemed a missing ship, and not insurable at 30l. per cent.

The learned Judge left it to the jury to say whether the letter in question was material, and if so, whether the disclosure of it was rendered unnecessary by information *abundant* within the reach of the underwriter.

A verdict having been found for the Plaintiff,

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Spinkie Serjt. obtained a rule nisi for a new trial, on the grounds above stated. He cited *Kirby v. Smith* (a), where a ship had sailed from *Elsmere* on her voyage home six hours before the owner, who followed in another vessel on the same day, and, having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship: it was held that those circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at *Elsinore* on the 26th of *July*," the day of her sailing.

Wilde Serjt. shewed cause. The assured is no doubt bound to communicate every fact within his knowledge, material towards estimating the risk, unless it be actually or impliedly within the knowledge of the underwriter. The time of a ship's sailing is not, in general, of itself a material fact; it may, however, become material in conjunction with other facts. The only fact which could

(a) 1 B. & A. 672.

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make the time of the *Fanny's* sailing material, is the arrival of the *Traveller* at Kinsale, and the *William* at Gravesend. Now, the assured could not be called on to communicate those arrivals, because it does not appear that he knew of them; if he did, he knew of them only through a channel which was equally open to the underwriter, *Lloyd's* books, the contents of which, it has been decided, an assured is not bound to communicate. *Friere v. Woodhouse*. (a) It may be contended, however, that even combining it with the arrival of the *Traveller* and *William*, the sailing of the *Fanny* was not a material fact, for the voyage from Oporto to London varying from sixteen to sixty days, the *Fanny* could not be deemed a missing ship on the 29th of December.

The jury, by their decision, have shewn that they considered the disclosure of the letter in question immaterial.

Spanlinx. In *Friere v. Woodhouse* it was the English list, as *Lloyd's* which the assured was excused from communicating; but he ought to communicate the contents of the foreign lists, for an underwriter is not bound to know the meaning of *para Londres*, or to be versant in all modern languages. And the assured must at his peril disclose every material fact, whether he deems it to be material or not, and whether it is material at the time or only becomes so eventually. Thus, in *Bridges v. Hamster* (b), the plaintiffs effected a policy of insurance on wines from Oporto to London on the 12th of November, at which time they were in possession of two letters from their correspondents at Oporto, the first of which, dated the 11th of October, stated, "We are loading the wines on board the *Stag*, Captain *Wheateley*, who intends to sail to-morrow;" the other, dated the 19th

(a) *Holt N.P. C.* 572.(b) 1 *M. & S.* 15.

of October, enclosed the bills of lading, which were filled up "*with convoy*;" the plaintiffs did not communicate these letters to the underwriters; and it was held a material concealment. To the same effect are *McAndrew v. Bell* (a), *Ratcliffe v. Shoolbred* (b), *Willes v. Glover*. (c)

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Cur. adv. vult.

TINDAL C. J. Upon consideration of this case, we feel great doubt as to the ground upon which the jury have given their verdict for the Plaintiff. They may have grounded their verdict upon the opinion which they formed, that the communication which the Defendant contends ought to have been made to him by the Plaintiff, was not a material communication. And if we could ascertain that this point had been distinctly found by the jury, we should not have disturbed the present verdict. But the jury may have come to their conclusion upon a different ground; namely, that, admitting the communication was material in itself, yet, that the knowledge of the facts which the Defendant had in his power from the inspection of the book in the inner room at *Lloyd's*, dispensed with such communication being made, and that the want of such communication could not now be set up as an answer to the action. Being, therefore, uncertain as to the real ground on which the verdict proceeded, and as the evidence now stands, being dissatisfied with the verdict, if grounded on the second point, we think the cause should go before another jury; the Defendant paying the costs of the former trial.

Rule absolute.

(a) 1 Esp. 373.

(b) *Park Ins.* 290.

(c) 1 N. R. 14.

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Jan. 31.

AUGUSTUS NEWTON v. CAMILLA NEWTON.

By order of *Nisi Prius*, a verdict having been entered for the Plaintiff, and the Plaintiff having by the order agreed to pay the Defendant 70*l.*, the Court allowed that sum to be set off against the Plaintiff's judgment.

BY order of *Nisi Prius*, it was ordered, with the consent of all parties, their counsel and attornies, that a verdict should be entered for the Plaintiff, damages 1*s.*, costs 40*s.*, and that the Plaintiff should pay to the Defendant the sum of 70*l.*, if the Defendant should state in writing that such sum was due from him to her, and should make an order for the payment thereof; and that either party should be at liberty to make the order a rule of Court.

The Defendant afterwards addressed the following order to the Plaintiff: —

“Sir, — I hereby request you to pay to my agents, Messrs. *Alexander*, the sum of 70*l.*, which is due from you to me. *Camilla Newton.*”

Alexander went to the Plaintiff to demand the money, and read to him the order of *Nisi Prius*, when the Plaintiff said it was right, and that he thought the 70*l.* had been settled long ago by being set off against the Plaintiff's costs in the action; that he was not prepared to pay, but would instruct his solicitor, if he saw no objection, to allow the set-off. Upon affidavit of these facts,

Merewether Serjt. moved to set off the 70*l.* against the Plaintiff's taxed costs.

Wilde Serjt., who shewed cause, contended that the sum claimed by the Defendant was no more than a simple

simple contract debt, and, therefore, could not be set off against a judgment. *Philipson v. Caldwell.* (a)

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Merewether. The debt claimed by the Defendant having accrued under an order of *Nisi Prius*, is analogous to and stands in the same degree as a judgment debt. But the Plaintiff, by consenting to pay under the order of *Nisi Prius*, has in effect agreed to the set-off.

TINDAL, C. J. The conclusion to which the Court comes, is on the construction of one instrument.

This is not the case of setting off a simple contract debt against a judgment. But by an order of *Nisi Prius*, which is almost equivalent to a judgment, the Plaintiff agrees to pay a certain sum to the Defendant; and the Court will supply what is a mere matter of form, the means of giving effect to that agreement.

Rule absolute.

(a) 6 Taunt. 176.

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(IN THE EXCHEQUER CHAMBER.)

Jan. 30.

TRAFFORD and Others v. The KING.

(In Error.)

On indictment for nuisance to a public canal navigation established by act of parliament, it was found by a special verdict, among other things, that the canal was carried across a river and the adjoining

INDICTMENT for a nuisance. The first count stated, that after the passing of a certain statute of the 2 G. 3., viz. in 1763, a canal was made pursuant to the said statute, which from that time had been used by all the king's subjects with vessels not exceeding thirty tons burden, on payment of certain reasonable tolls; that the canal, by means of an aqueduct made pursuant to the act, passed over the river *Mersey*, near the junction of a brook called *Chorlton Brook*; and that the Defendants, on the 1st of *January* 1770, and on other

ing valley by means of an aqueduct and an embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the fenders after mentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water; that the Defendants, occupiers of lands adjoining the river and brook, had, subsequently to the making of the canal, aqueduct, and embankment, heightened certain artificial banks, called fenders, constructed from time to time, as occasion required, on their respective properties, for the protection of their lands, so as to prevent the flood-water from escaping as above mentioned, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks, as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced, many hundred acres of land would again be exposed to inundation. Held, that to enable the Court to come to any decision between the parties, it ought also to have been found, — 1. Whether the raising fenders was an ancient and rightful usage, or whether it had commenced since the construction of the canal; 2. Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course; and, 3. Whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct.

days,

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days, raised divers mounds, &c. near the ancient banks of the said river and brook, viz. in parts thereof near the said aqueduct, and severally continued the same so raised, &c., whereby water was at divers times forced against the said aqueduct, and the sides and foundations thereof, and the sides and foundations of the said canal adjacent thereto, which water ought to have flowed, and, but for the said mounds, would have flowed and escaped by other ways, viz. over parts of the banks of the river and brook: by which means the said aqueduct, and the sides and foundations thereof, and of the canal adjoining thereto, had been injured, and were placed in danger of being broken down and destroyed, to the damage and common nuisance of the subjects using the said canal, and of the inhabitants and occupiers of the lands adjacent, &c. There were other counts, charging the Defendants with severally raising and erecting the mounds, &c., and wrongfully continuing mounds, &c. theretofore injuriously erected. One count stated the injury to be done by confining the water, and causing it to break down the banks of the river and damage the adjacent lands, as well as the aqueduct and canal. Plea, not guilty. At the trial before Bayley J., at the Summer assizes for the county of Lancaster 1829, the jury acquitted some of the Defendants, and, as to others, found a special verdict, stating the following facts: — In 1763 the navigable canal mentioned in the indictment was made from *Longford Bridge* in the township of *Stretford*, to the river *Mersey*, at a place called the *Hemp Stones* in the township of *Halton*, in pursuance of an act of the 2 G. 3. c. 11, enabling the then Duke of *Bridgewater* to make the same; and the king's subjects ever since the making of the canal, have navigated it with boats not exceeding thirty tons burden, at their free will and pleasure, paying the duty by law established. The canal extends for half a mile north and south across a vale through which the river *Mersey* runs in a westerly

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direction; it is upon the same level throughout, and is raised by artificial embankments on each side through the whole half mile, and is carried across the river by an aqueduct of one arch (mentioned in the indictment), which was built at the time of making the canal. At the distance of 430 yards from the river, towards the north, the canal is supported upon three arches, also built at the last-mentioned time; on the south side it has two culverts at 160 and 460 yards' distance from the river, one made at the same time with the canal, the other built by the trustees of the late Duke of *Bridge-water* (the proprietors of the canal) in 1806. About 800 yards above the aqueduct the river is joined from the east by *Chorlton Brook*, the capacity of which, at the junction, is equal to one tenth of the capacity of the river at the same point; and after this junction, the river, which had before flowed northward, turns immediately to the west.

On each side of the river, and also of the brook, there are now artificial banks called fenders, made to prevent the water, in times of flood, from overflowing the adjacent lands. These fenders have from time to time been raised, as occasion required, by proprietors and occupiers of adjoining lands; and the fenders on the banks of the river on the north side are now three feet higher than they were twenty years ago; the fenders on the northern banks of the brook two feet three inches higher than they were at the same period. Before the banks of the river and of the brook were so raised, the water of the river, in times of flood, was frequently penned back up the brook, and, together with the water of the brook, ran over the north bank of the brook, and inundating certain lands (the situation of which was particularly described in the verdict), made its way to the three arches above mentioned, on the north side of the river. After passing through these, it flowed along a low tract of land, until it fell into the river again at a place

place called *Ernston*, two miles from the said three arches, inundating in its course, both above and below the arches, many hundred acres of land, throwing down hedges, and otherwise doing much mischief. No regular watertcourse was ever kept open for the flood water. Since the banks of the river and of the brook have been raised as above mentioned, the flood water, whenever it has overflowed or broken down the banks of the brook, has taken the same course to the three arches. The whole three arches are not necessary for any other purpose than for the passage of such flood water; one arch, of small dimensions, would be sufficient for the passage of all other water collected at that place. At times, since the making of the canal, the water of the river has overflowed the banks above its junction with the brook, and has inundated a tract of land on the south and west of the river; and by reason of the embankment on which the canal is raised, and of the want of sufficient outlets underneath, this flood water has (particularly in the year 1806) broken down the south bank of the river between the aqueduct and the brook, passed across the river, and broken down the north bank; and then, after inundating the adjoining lands, flowed down to the three arches before mentioned. In 1806 the trustees of the Duke of *Bridgewater* (the then proprietors of the canal,) on complaint from the landowners on the north bank of the river, made them compensation for the damage so sustained; and they have, since that time, paid an annual rent or compensation for a piece of land on the south side, which was on that occasion washed away. They have, also, from time to time repaired the south bank of the river and the fender thereon, to the extent of fifty yards eastward from the canal.

The verdict then described the particular fields and fenders belonging to the several Defendants, and it appeared that every fender was much higher than the land

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to the north of it, and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and kept and continued so raised by the Defendants severally in their respective occupations, but not jointly. It also described the level of the lands through which the flood-water was accustomed to escape in the direction of the three arches as first above mentioned; and also the level of the bed of the river for some miles above its junction with the brook. A statement was then given of injuries sustained in July 1828, when the flood-water broke the banks of the river and canal, (the navigation of which was stopped,) and ultimately flowed down to the three arches before mentioned.

The improved drainage of the country higher up the river for many miles has occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow to it for several years after it was built, but the aqueduct is still wide enough for the river water to pass at all times except in high floods. The raising of the fenders on the banks of the river and of the brook, has occasioned a much greater quantity of water to flow to the aqueduct in high floods than did or could flow to it for several years immediately after it was built, and has rendered it insufficient for the passage of the water in high floods, and thereby greatly endangered the canal. If the fenders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and brook in high floods would overflow the banks of the brook, and inundate the neighbouring lands, and would take the direction in which the flood-water used formerly to flow to the said three arches, and thence to *Ermston*; but many hundred acres of land would thereby be inundated, and great injury done to the owners and occupiers of that land. The fenders on the banks of the

the

the river and of the brook, have not been raised more than was necessary to prevent the lands being so inundated.

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The case having been removed into this court, on error, after judgment had been given for the crown by the Court of King's Bench,

F. Pollock, for the Defendants below, contended that, as the bed of rivers is continually rising from the gradual deposit of matters washed down from the source to the mouth, the owners of adjoining lands must have a right of raising the banks from time to time to prevent the effects of inundation. That if the Defendants below had in this case raised their embankments higher than usual, it was owing to the prosecutors' causeway, which, obstructing the passage of the waters in ordinary floods, and thereby occasioning damage to the land, it became necessary to prevent the overflow by a higher bank. By the statute which regulated the affairs of the canal, the prosecutors were bound to allow sufficient waterway.

Wightman, *contra*, admitting that to a certain extent the owners of adjoining lands might have, without occasioning injury to others, the right of raising fenders to obviate the effects of ordinary floods, denied the right, if the exercise of it occasioned injury to others, as it must do supposing the banks raised to such a height as to contain all floods whatever. As upon such a supposition the banks must continually rise, no bridge could be erected high enough to carry off the water for many years.

(As the judgment of the Court turned upon the form of the special verdict, it would be superfluous to state the argument at greater length.) (a)

Cur. adv. vult.

(a) See 1 B. & Adol. 874.

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TINDAL C. J. Upon this special verdict; in which judgment has been given for the crown by the Court of King's Bench, such judgment appears to have proceeded expressly on the principle, that the *ancient* course and outlet of the flood water had been obstructed by the wrongful raising from time to time of the fenders therein described, by the Defendants below...

Whilst, however, we agree in the principle so laid down by the Court, we are unable to discover, upon this special verdict, a finding of sufficient facts to warrant its application to the present case; In order to shew the Defendants to have been guilty of the offence charged in this indictment, we think, in the first place, it ought to appear distinctly upon the special verdict, that the raising and heightening of the fenders on the lands of the respective Defendants, was not an accustomed and rightful usage which has obtained from time to time; that it was an enjoyment commencing since the construction of the canal in 1763; not sanctioned by ancient usage, or by the ordinary right which every man possesses, *prima facie*, to protect his own property, provided he can do it without injury to others; and that it ought also to appear distinctly that the course which the flood-water is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the ancient and rightful course which it ought to take;

And we think, in the second place, it ought not to be left in doubt upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary in consequence of the construction of the aqueduct and embankment. On the contrary, that it ought to appear distinctly upon the finding by the jury, either that the embankment and the aqueduct have not wrongfully penned back more water upon the low lands of the Defendants than was formerly collected in times of flood; or, that the banks of the

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the river and brook have been raised without any necessity, and not in self-defence against the consequences of the construction of the embankment and aqueduct; or, at all events, that the banks have been raised by Defendants to an unreasonable and unnecessary height. And if these facts are left in doubt upon the special verdict, we think no judgment can be given against the Defendants.

Upon the point firstly above suggested, there appears no doubt but that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the act, then the construction of the aqueduct and embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the act, unless so far as the act of parliament may have restrained the exercise of such rights.

It appears, therefore, to us to be indispensable, in order to determine whether the acts of the Defendants stated in the indictment are wrongful or not, that the jury should find such facts as will enable us to say, with certainty, whether, before the making of the canal and embankment, there was any exercise by the landowners of the right of raising and heightening the banks from time to time, as occasion required, so as to confine the water at all times to the ordinary channels, and prevent it in times of flood from overflowing the banks; or, whether the passage over the banks in times of flood was the usual and ordinary course.

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But the present special verdict leaves the commencement of the enjoyment of this right in complete uncertainty. It states only that there "now are" on each side of the river and brook, artificial banks called "fenders," which have from time to time been raised, as occasion has required. It finds, indeed, in one part, that these banks are not raised higher than is necessary, a fact very strongly in favour of the Defendants. But it gives no date whatever to the origin of these acts of enjoyment on the part of the owners of land adjacent to the river. Upon such a finding we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again, the jury find, that before the banks of the river and brook were raised, the water of the river and brook was frequently perched back, and flowed over the north bank, by a track or course which is described in the verdict, and which is stated to fall into the river again at a place called *Emstone*, about two miles below the three arches. But it nowhere appears whether the flood-water was carried in that course before the aqueduct was made; nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. But in order to establish the charge against the Defendants, it was essential to shew that by their raising and heightening the banks of the river and brook, they prevented the water in time of flood from flowing in this particular course. We ought, therefore, to see upon the face of the verdict, that there was an existing right of this course for the flood water over the lands described in the special verdict, before we hold the Defendants guilty of the offence charged.

Again upon the second ground above suggested, we think this special verdict deficient. The special verdict

leaves

leaves it questionable whether the nuisance, complained of, *i. e.* the danger to the aqueduct and the canal, is not attributable in some degree at least, if not entirely to the act of the owners of the canal. The special verdict states in terms, that since the making of the canal, the water of the river has at different times flowed over the banks much higher up the within mentioned river than the point of its junction with the brook; and then proceeds to state an instance of damage done in 1806, for which the commissioners named, in the act of parliament awarded compensation on account of the insufficiency of the outlets under the canal embankments. Again, in the statement made of the levels of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back the water, thus creating a necessary and justifiable ground for raising and heightening the banks. Without, however, in any manner asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe that this special verdict does not state with sufficient certainty what is the real cause of the penning back of the water in time of flood, nor whether the raising and heightening of the banks by the Defendants had a legal and justifiable commencement, nor what is the rightful course of the flood water, nor generally does it lay before us such facts as will enable us to say whether the acts done by the Defendants are lawful or not, or to give any judgment, satisfactory to ourselves, that should bind the rights of the contending parties.

Under these circumstances, the only course we can pursue is, to reverse the judgment which has been given for the crown, and to award a *verdict non pro*, and if another special verdict should be found, we think it would be desirable that it should contain an express finding

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finding of the jury upon the several points to which we have above adverted, rather than the statement of facts from which the finding of the jury is only to be inferred.

Venire de novo awarded.

(IN THE EXCHEQUER CHAMBER.)

Jan. 30.

GIBB v. MATHER and Others,

Where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the drawer, presentment to the acceptor at that place must be proved.

THE declaration stated that the Defendant below, on the 27th of September 1828, at Liverpool, (that is to say, at Preston, in the county of Lancaster, according to the usage and custom of merchants, made and drew a certain bill of exchange in writing, and then and there directed the said bill of exchange to Messrs. Chapman and Fairclough, and then and there required the said Messrs. Chapman and Fairclough, four months after the date thereof to pay to the order of the Defendant below, in London, 175l. 10s. value received in timber; which bill the said Messrs. Chapman and Fairclough afterwards, to wit, on, &c. at, &c. accepted according to the said custom and usage of merchants, payable at Messrs. James, Ashby, and Co., bankers, London. And the Defendant below, to whose order the said sum of money in the bill of exchange specified was to be paid, afterwards, to wit, on, &c. at, &c. by one John Kempster, then and there being the agent of the Defendant below in that behalf, addressed the said bill of exchange according to the said custom and usage of merchants, and then and there delivered the said bill of exchange, so indorsed, to one John M'Killop ;

and

and the said *J. McKillop* afterwards, to wit, on, &c. at, &c. duly indorsed the said bill of exchange, and then and there delivered the same, so indorsed as aforesaid, to the Plaintiffs below. And the Plaintiffs below averred that afterwards, to wit, on, &c. at *Liverpool*, &c. the said bill was shewn and presented to the said Messrs. *Chapman* and *Fairclough*, upon whom the said bill was drawn, for payment thereof; and the said Messrs. *Chapman* and *Fairclough* were then and there required to pay the same; but that the said Messrs. *Chapman* and *Fairclough* did not, when the said bill was so shewn and presented to them for payment as aforesaid, or at any other time, pay the same, or any part thereof, but on the contrary thereof, then and there wholly refused so to do, and therein wholly failed and made default; of which said several premises the Defendant below afterwards, to wit, on, &c. at, &c. had notice; by reason whereof, and by force of the said custom and usage of merchants, the Defendant below then and there became liable to pay to the Plaintiffs below the said sum of money in the said bill mentioned, when he, the Defendant below, should be thereunto afterwards requested; and being so liable, the Defendant below, in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook, and then and there faithfully promised the Plaintiffs below, to pay them the said sum of money in the said bill mentioned, when he, the Defendant below, should be thereunto afterwards requested.

In a second count it was alleged that the acceptors were, at *Liverpool*, required to pay the bill according to the tenor and effect of the bill and of the indorsements thereon; and

In a third, that the bill was, at *Liverpool*, in due manner shewn and presented to the acceptors.

At the trial before *J. Parke J.*, at *Lancaster* assizes,

the

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the Plaintiffs below proved, that they were partners together in trade, and holders of this bill of exchange, which was as follows:— "*Liverpool*, 27th of *September* 1828, four months after date, pay to the order of myself in *London* 175*l.* 10*s.* value received in timber: *Duncan Gibb*. To Messrs. *Chapman and Fairclough, Liverpool*. Payable in *London*." The bill was accepted as follows:— "Accepted at Messrs. *Jones, Lloyd, and Co.* bankers, *London*. *Chapman and Fairclough*." And indorsed as follows:— "P. pro *Duncan Gibb*. *John Kempster*." The signature *Duncan Gibb* to the bill was proved to be the handwriting of the Defendant below; and the acceptance of the bill by Messrs. *Chapman and Fairclough*, the handwriting of *Thomas Fairclough*, one of the partners in the firm of Messrs. *Chapman and Fairclough*. The Defendant below himself presented the bill for acceptance to the said *Thomas Fairclough*, and himself received back the bill from the said *Thomas Fairclough* so accepted as above stated. The indorsement "P. pro *Duncan Gibb*. *John Kempster*," was the handwriting of the said *John Kempster*, who when he so indorsed the bill, was duly authorized by the Defendant below to indorse it on behalf of the Defendant below. The bill was presented at *Liverpool* to the said acceptors Messrs. *Chapman and Fairclough* for payment, on the 30th day of *January* 1829, on which day the bill had accrued due, and the said acceptors then and there refused to pay the same; and notice was given on the same 30th of *January* 1829, by the Plaintiffs below to the Defendant below of the presentment of the bill to the said acceptors, and of their refusal to pay the same. These facts were also admitted by the counsel for the Defendant below. *Parke J.* then delivered his opinion to the jury, that the said several matters so produced and given in evidence and admitted to be true, were

were sufficient to entitle the Plaintiffs below to a verdict, and with that direction left the case to the jury, who found for the Plaintiffs below.

A bill of exceptions having been tendered to the above direction of the learned Judge, it was now argued by

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F. Kelly, for the Defendant below. The Plaintiffs below have no claim on the Defendant below, unless they conform to the contract into which he has entered. That contract is expressly to pay in *London*. Formerly, when the acceptor of a bill of exchange accepted it payable at a particular place, the Court of King's Bench held that such an acceptance was an expansion, not a qualification of his liability to pay every where; that a demand might be made on him in the particular place in question in addition to all other places in which he might be found; but that, as he was liable in all places, it was not necessary to aver or prove a demand at the particular place in question. The Court of Common Pleas, on the other hand, held that the designation of a particular place of payment was a qualification of the contract, and that, therefore, a demand at such a place must be averred and proved. The House of Lords in *Rowe v. Young* (a) decided that the Court of Common Pleas had put the true construction on such a contract, but immediately passed an act of parliament, rendering the liability of an acceptor such as it had been expounded by the Court of King's Bench, unless to the designation of a particular place of payment in his acceptance he added the words, "and not else where;" which words not being found in the acceptance of this bill, the acceptance is a general acceptance: that act, however, 1 & 2 G. 4. c. 78, is, by its title, preamble,

(a) 2 Brod. & Bingh. 165. where see all the authorities collected.

and

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and enactments, confined to the case of *acceptor*. Now, in the case of a *drawer* of a bill of exchange, or maker of a promissory note, the Court of King's Bench and the Court of Common Pleas always concurred in holding, that the mention of a particular place of payment in the body of such instrument was an essential part of the contract imperative on the holder, who must therefore aver and prove a demand at that place in order to charge the drawer or maker. *Sanderson v. Bowes* (a), *Roach v. Campbell*. (b). It may be said that the bill in this case having been accepted generally before it was issued by the drawer, the latter has given currency to such general acceptance, and therefore is estopped to object that demand has not been made at the particular place specified. But though an acceptor may by apt words limit his own responsibility, or make it differ from the contract of the drawer, as by accepting at a longer date, or for a part only of the sum mentioned in the bill, no case can be found in which he has been allowed, under any circumstances, to enlarge the responsibility of the drawer. The fact, therefore, of the drawer's having issued the bill with this acceptance on it, may shew that he did not object to the expansion of the acceptor's liability, but is no proof that he consented to the expansion of his own.

Rascoe, contra. The statute 1 & 2 G. 4. c. 78, enacts, that an acceptance such as the present shall be deemed a general acceptance to all intents and purposes. Now those words would be superfluous, and a main object of the statute would be defeated, if a demand which would be sufficient as against the acceptor, should be held insufficient as against the drawer. In *Selby v. Eden* (c) a bill of exchange was, by the drawer, made

(a) 14 East, 500.

(b) 3 Campb. 247.

(c) 3 Bingh. 611.

payable

payable in *London* and there accepted; and yet it was held that averment or proof of presentment in *London* was unnecessary; and in *Fayle v. Bird* (a) that decision was confirmed.

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F. Kelly, The cases referred to are both actions against the acceptor; and in *Fayle v. Bird* Lord *Tenterden* nonsuited the plaintiff for want of a due presentment, though he afterwards acceded to the authority of *Selby v. Eden* for the sake of uniformity.

Cur. adv. vult.

TINDAL, C. J. This was an action by the indorsees against the drawer of a bill of exchange after non-payment by the acceptor. Upon the trial of the cause it appeared, upon production of the bill, that the drawer, in the body of the bill, required the drawees to pay to the order of himself "in *London*," the sum mentioned therein; that the bill was addressed to Messrs. *Chapman and Fairclough, Liverpool*, with the additional words "payable in *London*," and that it was by them accepted at "Messrs. *James, Lloyd and Co* bankers, *London*." It appeared further, that on the day the bill became due, it was presented for payment to the acceptors at *Liverpool*, who refused payment, and that due notice of such refusal was given to the Defendant below. The learned Judge, who tried the cause, directed the jury that the evidence above stated was sufficient to entitle the Plaintiffs below to recover, and the jury found their verdict accordingly for the Plaintiffs below. The propriety of this direction now comes before us upon a bill of exceptions tendered by the Defendant below; and the question raised for our consideration is this, Whether in an action against the drawer of the bill above set

(a) 6 B. & C. 531.

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forth, on the ground of nonpayment by the acceptor, it is, or is not, necessary to prove a presentment for payment at the banking house in *London* where the same is made specially payable by the acceptance. And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

Before the passing of the statute 1 & 2 G. 4. c. 78., it was a subject of considerable doubt in the courts of law whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the *acceptor*, without averring in the declaration, and proving at the trial a presentment for payment at the place where the drawee had by his acceptance made the bill payable. Upon that point the Court of Common Pleas had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of King's Bench, on the contrary, had held it was unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment, if the holder thought proper to apply there.

The conflicting opinions of the two Courts upon that point were set at rest before the passing of the statute, by the judgment of the House of Lords in the case of *Rowe v. Young (a)*, by which judgment the opinion held by the Court of Common Pleas was decided to be the law of the land.

But the doubt which had been formed, was confined to the case where the question arose between the holder and the acceptor; in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no

(a) 1 B. & B. 165.

doubt appears to have existed, but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor.

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Still less did the doubt ever extend to cases where the drawer directed by the body of the bill that the money should be payable at a particular place. In such a case all the courts at *Westminster* agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of King's Bench in the case of a banker's promissory note, which was made payable at a place named in the body of the note. *Sanderson v. Bowes*. (a) The same doctrine was also laid down in the case of *Roche v. Campbell* (b), where the action was brought by the indorsee of the note against the indorser. Now, no distinction as to this point can be taken between the drawer of a bill of exchange and the indorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder: and the drawer of the bill, like the indorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill.

Such then being the state of the drawer's liability, at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone. The title

(a) 14 East, 500.

(b) 3 Campb. 247.

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of the act is to regulate acceptances of bills of exchange; and after reciting that it had been adjudged, that where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance, but that a general practice and understanding had prevailed amongst merchants, that such acceptance was a general acceptance, it proceeds to enact, that, after the passing of that act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place by the words and in the manner directed in the act.

The very reference in the statute to the adjudication by law, imports that the legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act. Again, the enactment comprehends in terms the case of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast upon acceptors by the enactment that an acceptance of a bill payable at a particular house shall thenceforth be considered as a general acceptance; and it gives the acceptor the power of protecting himself against such inconvenience by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed his money to be paid at a particular place, and after an acceptance made payable at that place the bill should be returned to him dishonoured without a presentment to the house where it is made payable, it is as great a hardship upon him, as the act had contemplated and provided for in the case of the acceptor. If then the statute had intended the enactment to apply to the case of the drawer,

we

we cannot but think the same protection would have been given to the drawer which has been given in terms to the acceptor of the bill.

One argument advanced on the part of the Plaintiff below is, that the acceptor has varied in his acceptance from the original terms in which the bill was drawn; and as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance under the operation of the late statute. But the answer to this argument seems to be that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance, any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in *London*, — the drawee accepts, specifying the particular house in *London* at which he intends to pay the bill. Without such specification the acceptance might be useless from its generality; and the form of the bill implies that the drawer expected and intended the drawee to make it.

We, therefore, think that as no presentment was made at the house of the bankers in *London*, where the acceptor had undertaken to pay it, the liability of the drawer never arose, and, consequently, that the judgment which has been given for the Plaintiff below must be

Reversed.

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Jan. 31.

MASTERMAN and Others v. JUDSON.

1. In an action against Defendant for not obeying a *subpœna*, the declaration stated that the Plaintiff caused to be left with Defendant a copy of the writ of *subpœna*; Held, that a Judge at *Nisi Prius* had authority under 9 G. 4. c. 15 to allow this allegation to be amended as follows: —
 “a copy of so much of the said writ of *subpœna* as related to the said Defendant.”

2. In such an action as the above, it is *primâ facie* sufficient to allege that the Defendant was a material witness, and that his absence caused the Plaintiff to be nonsuited,

without averring that Plaintiff had originally a good cause of action. At all events, such allegation is sufficient after verdict.

THE declaration stated that Plaintiffs before the committing the grievances by the Defendant thereafter mentioned, to wit, in Hilary term 1831, &c. before Sir N. C. Tindal, Knight, and his companions, Justices of the Bench at Westminster, impleaded one John Malin in a plea of trespass to the damage of said Plaintiffs of 100*l.*; and such proceedings were thereupon had that afterwards, to wit, on the sittings at *Nisi Prius* holden at Hertford, in the county of Hertford, on the 2d of March 1831, before the Honourable Sir John Bayley and the Honourable Sir W. Garrow, Knights, a certain issue before then joined in the said plea between said Plaintiffs and said John Malin came on to be tried by a jury of the county; and also that on the 31st of January, in the year aforesaid, said Plaintiffs prosecuted, out of the Court aforesaid, his Majesty's writ of *subpœna* directed to said Defendant and others, commanding them and every of them that all other things set aside, &c. they should appear before the justices assigned to take the assizes, &c. at the said town of Hertford, in the said county, on Wednesday the 2d day of March then next, by nine of the clock in the forenoon, and so from day to day until, &c. to testify, &c. in a certain action then in the Court before the said King's Justices depending between said Plaintiffs and said John Malin of a plea of trespass, on the part of said Plaintiffs, and that they or any of them should in nowise omit, under the penalty of every of them of 100*l.*: which said writ said Plaintiffs, on the 19th of February, in the year aforesaid, caused to be made known to and shewn to said Defendant, and caused a

copy

copy to be left with said Defendant of *so much of the said writ of subpoena as related to the said Defendant*, and paid to said Defendant the sum of 10*l.* for the costs of his attendance as a witness; and although said Defendant could have given material evidence for said Plaintiffs on said trial against said *John Malin*, yet said Defendant would not appear on trial of said issue, although he had no lawful cause or impediment to the contrary; and by reason thereof, and on no other account whatsoever, said Plaintiffs were nonsuited, and such proceedings were thereupon had, that afterwards, to wit, in *Easter* term, in the year aforesaid, it was adjudged by said Court that said *John Malin* should recover against said Plaintiffs 25*l.* 6*s.* for his costs and charges by him laid out in and about his defence in that behalf: by means of which said several premises said Plaintiffs were not only forced to pay said *John Malin* said sum of 25*l.* 6*s.*, together with costs of levying the same, amounting to the sum of 10*l.*, but were also greatly hindered and delayed in the recovery of their damages in the plea aforesaid, and did necessarily incur a great expense, amounting to the sum of 100*l.* in and about prosecuting said suit; which said Plaintiffs are liable to pay, and are by means of the premises otherwise greatly injured, to Plaintiffs' damage of 200*l.*

At the last *Hertford* assizes it appearing that the original writ of *subpœna* (for disobeying which this action was brought) was directed to the Defendant *Judson* and two others therein named, while the copy served on him was directed to him and *John Doe*, the latter name not appearing in the original *subpœna* at all, Lord *Tenterden* C. J., before whom the cause was tried, caused the record to be amended by the insertion of the words printed above in italics, under the authority of the 9 G. 4. c. 15. which enacts, "That it shall and may be lawful for every court of record holding plea in civil actions, any Judge sitting at *Nisi Prius*, and any court of

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oyer and terminer and general gaol delivery in *England, Wales, the town of Berwick-upon-Tweed, and Ireland*, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared: and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court, from which such record issued, shall be amended accordingly."

A verdict having been found for the Plaintiffs,

Taddy Serjt. obtained a rule *nisi* to set it aside, on the ground that the learned Judge had no jurisdiction under the recent act to make the amendment in question, there being in this declaration no recital of the writ of *subpoena*, but merely an allegation that the Plaintiffs had caused the Defendant to be served. He also moved in arrest of judgment, that it was nowhere averred the Plaintiffs had a good cause of action against *Malin*, the Defendant in the original action.

Wilde Serjt. shewed cause against the rule. The stat. 9 G. 4. c. 15. is remedial, and must receive a liberal construction. The circumstances of the present case fall within the mischief contemplated by the act, and ought, therefore, to be within the remedy. The allegation that the Defendant was served with a *subpoena*, is
 a suffi-

a sufficient reference to the instrument to authorize the Judge to correct any variance in the mere description of the instrument. In *Briant v. Eicke* (a), Lord Tenterden C. J. amended a recital that a judgment had been obtained in the Court of King's Bench by substituting, according to the fact, *Common Pleas* for *King's Bench*.

As to the objection in arrest of judgment, it is not for the party who is *primâ facie* injured by the misconduct or neglect of another to shew that he had a good cause of action or of defence; it is for the party charged, to shew, if he can, that his opponent had not. *Godefroy v. Jay*. (b) But at all events, the defect, if any, is cured by verdict, particularly when the declaration, after averring the Defendant's disobedience of the *subpœna*, adds, "By reason whereof, and on no other account, the Plaintiffs were nonsuited." Thus in actions for a malicious prosecution the omission of an averment that the prosecution or action is at an end is cured by verdict. 1 *Wms. Saund.* 228 a. (c)

Taddy and Stephen Serjts. contra. The learned Judge has admitted into the declaration the allegation of a new fact, namely, the service of a copy of a part of the writ, instead of merely correcting a variance in the recital of the writ. And the amendment in itself contains demurrable matter; for how much of the instrument in question applied to the Defendant, is matter of law, to be determined by the Judge upon the production of the instrument. It will be of dangerous consequence to extend the statute to the introduction of new allegations of fact, which may be a surprise upon the opposite party.

Then, the Plaintiffs should have averred that they had a good cause of action against *Malin*; for without averring that, they do not shew that they had any right to

(a) 1 *M. & M.* 359.

(b) 7 *Bingb.* 413.

(c) See also *M'Murdo v.*

Smith, 7 *T. R.* 518. *Pippet v.*

Hearn, 5 *B. & A.* 634.

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subpœna the Defendant. In *Goodwin v. West* (a) it was held that the action of debt for the penalty of 10*l.* on 5 *Eliz. c. 9.* for not appearing to give evidence after service of a *subpœna* is given only to the party grieved, and that if the Plaintiff be not grieved he cannot bring the action. The same point was established in *Maddison v. Shaw* (b), where the Court said there must be a particular damage set forth. *Aston's Entries*, 40. 90. And the principle applies with greater force to an action on the case for general damages for a similar neglect.

So in actions against the sheriff for an escape, it is necessary to aver that the plaintiff had a good cause for arresting the party. 2 *Wms. Saund.* 151. *Vid. Entr.* 16. 60. And in *Alexander v. M^cAuley* (c) in an action against the sheriff for an escape on *mesne* process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner.

The Court said, that the amendment was the only point on which they had any doubt; and as it applied to a general rule of practice they would take time to consider.

Cur. adv. vult.

TINDAL C. J. Upon the point reserved in this case for further consideration, namely, whether the amendment made upon the record of *Nisi Prius* at the trial of this cause was an amendment authorized by the late act of 9 *G. 4. c. 15.*, we think such amendment falls within the meaning and construction of the act, and is fully authorized by the same.

The declaration, after stating that the writ of *subpœna* was issued in the cause, proceeded to aver "that the Plaintiffs caused the said writ to be made known and shewn to the Defendant, and caused a copy to be left with him." Upon the trial it appeared, that there was

(a) *Sir W. Jones*, 430. *Gro. Car.* 522. 540.

(b) 5 *Mod.* 355.

(c) 4 *T. R.* 611.

a variance

a variance between the copy or ticket, as it is usually termed, which had been left with the witness, and the original writ of *subpœna*, the former purporting to be addressed to the Defendant and *John Doe* alone, whereas the original *subpœna*, when produced, appeared to be addressed, not only to the Defendant, but to two other real persons. The Plaintiffs praying the Judge, who tried the cause at *Nisi Prius*, to order an amendment to be made under the act above referred to, he directed an amendment to be made in these words; viz. "Caused a copy of so much of the said writ of *subpœna* as related to the Defendant to be left with him." The trial then proceeded on the amended declaration, and a verdict was found for the Plaintiffs.

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Two objections are made by the Defendant to the authority of the learned Judge to direct this amendment; first, that this is not an amendment of the record, to prevent a variance between any matter in writing produced in evidence, and the recital or setting forth thereof upon the record; but it is the insertion of a new and distinct allegation of an independent fact: secondly, that the Defendant might have demurred to the allegation as it now stands, if it had appeared in the declaration originally, and that he ought not to lose that advantage by its being first put upon the record when the cause is before the jury.

As to the first objection, however, it appears to us that though the allegation introduced by that amendment may, at first sight, seem to be an allegation of a new fact, yet, upon looking more accurately at the effect of the amendment, it is not so, but is in substance an amendment to prevent "a variance between the matter in writing produced in evidence and the recital or setting forth thereof upon the record." For when the Plaintiffs allege that they left a *copy* of the writ of *subpœna* with the Defendant, they do, by that word "copy,"

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"copy," virtually embody and set forth upon the record the whole writ of *subpœna* represented compendiously by that same word; and, inasmuch as the production at the trial, of the written paper actually left with the Defendant, varied from the *subpœna* itself in the particulars above referred to, it seems to us the alteration directed to be made was an alteration which prevented the variance between the evidence and the record. Suppose the declaration, instead of alleging that the Plaintiffs had left a copy of the writ of *subpœna* with the Defendant, had alleged that he had left with him "the following written paper," &c., setting out the *subpœna* according to the tenor; there can be no doubt but that the case would then have fallen directly within the act; and that, upon the production of the paper actually left with the Defendant, the statute would have authorized an amendment by striking out those parts in the declaration which were not found in the paper itself. The amendment, which was directed, appears to produce the same effect, though in a more compendious manner. Looking to the object of this act, which was according to its title, to prevent a failure of justice by reason of variances between records and writings produced in evidence in support thereof, we think it should receive a construction as liberal as the words will admit; and that the amendment now under consideration falls within the fair interpretation of the words of the act.

The second objection urged by the Defendant was, that if the Plaintiffs had originally made this allegation in the declaration, he might have demurred to the declaration. Now, without determining the question, whether such demurrer would have been sustainable or not, we think, as it does not appear by the evidence that the Defendant took any such objection at the time the amendment was directed, he cannot avail himself of it
 in

in this stage of the proceedings. For if they had, in the first instance, made that their ground of objection, it is by no means improbable that the Lord Chief Justice would have directed the Plaintiffs to set out at length on the record the written paper which they left with the Defendant; and by so doing, though the cause could not but proceed as the act directs, the Defendant might have taken the objection afterwards, if such objection is available in arrest of judgment; or he might have refused to make the alteration, and thereby compelled the Plaintiffs to be nonsuited; or, at all events, such terms might have been imposed on the Plaintiffs as would have met the justice of the case.

On the whole, we think we should very much abridge the benefit of a most useful act if we were to hold the present amendment to be unauthorized by it.

Rule discharged.

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MEDEIROS v. HILL.

Jan. 27.

ASSUMPSIT on a charter-party dated September 27th, 1830. The Defendant undertook that his ship being then at *Plymouth* should return with all convenient speed to *Liverpool*; should there load a full and complete cargo of salt; proceed therewith to *Terceira*; deliver the same there, freight free; and there, or at *St. Michael's*, load a homeward cargo of fruit, restraint of princes, &c. excepted; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to *Liverpool*, and there take the cargo on board, and sail on the voyage described in the charter-party.

At the trial before *Tindal C. J.*, *London* sittings after

Michaelmas

It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the Defendant knew the fact at the time of entering into the charter-party.

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Michaelmas term, it appeared that the Defendant's ship on her passage from *Plymouth* to *Liverpool* had touched at *Fowey*; that she had arrived at *Liverpool* too late to ship the salt, and never proceeded to *Terceira*. At the time of the contract *Terceira* was publicly and officially known to be under blockade by the government of *Portugal*. There was no evidence, however, of any understanding between the contracting parties that the Defendant was to violate the blockade; on the contrary, it rather appeared that the blockade had never been thought of till after the charter-party had been executed by the Defendant's son on the part of the Defendant; and long before that time the blockade had ceased to be real or effective. A verdict having been found for the Plaintiff with 100*l.* damages,

Taddy Serjt. moved for a new trial. The stipulation to proceed to *Liverpool* with all convenient speed did not preclude the Defendant from touching at *Fowey*, which is not out of the course from *Plymouth* to *Liverpool*, and even if it were, the touching there would be no breach of the Defendant's contract, supposing him to have touched in the ordinary course of his business, and the voyage in other respects to have been performed with all convenient speed. A carrier who engages to go with all convenient speed does not thereby engage to go in the most direct line from place to place; and it is a sufficient performance of his contract if he use due diligence in his ordinary line. *Max v. Roberts.* (a) But the voyage to *Terceira* was illegal, and the Plaintiff cannot recover for the Defendant's omission to proceed thither; *Terceira* having at the time of the contract been in a state of blockade, the Defendant had no right to sail with an intention to violate the blockade. Case

(a) 12 *East*, 89.

of the *Neptunus* (a), *Adelaide* (b), and *Shepherdess* (c),
Naylor v. Taylor (d), *Dalgleish v. Hodson*. (e)

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At all events the Defendant was not bound to procure simulated papers, or to run the risk of capture. In *Tonteng v. Hubbard* (g), a *British* merchant chartered a *Swedish* ship on a voyage to *St. Michael's* for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes; the ship was prevented from reaching *St. Michael's* within the fruit season by an embargo laid on *Swedish* vessels by the *British* government; and it was holden, that the *Swedish* owner could not by proceeding on the voyage after the embargo was taken off entitle himself to recover the freight against the *British* merchant.

Cur. adv. vult.

TINDAL C. J. This was an action upon a charter-party, by which the Defendant engaged that his ship should return with all convenient speed to *Liverpool*, and there load a full and complete cargo of salt, and proceed therewith to *Terceira*, and deliver the same there freight free, and there, or at *St. Michael's*, load a homeward cargo of fruit; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to *Liverpool*, and there take the cargo on board, and sail on the voyage described in the charter-party.

After verdict for the Plaintiff, and 100*l.* damages, a motion has been made for setting the same aside, and for a new trial, on two grounds; first, that at the time the charter-party was entered into, *Terceira* was in a state of blockade by the government of *Portugal*, which blockade had been notified to the *English* government, and, consequently, that the voyage described in the

(a) 2 *Rob. Adm. R.* 110.

(b) *Ibid.* in notis.

(c) 5 *Rob. Adm. R.* 263.

(d) 9 *B. & C.* 718.

(e) 7 *Bingb.* 495.

(g) 3 *B. & P.* 291.

charter-

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charter-party was an illegal voyage. Secondly, that although the voyage may not be, strictly speaking, illegal, the circumstance of the blockade operated as an excuse for the non-performance of the contract.

The case of the *Neptunus* (a), which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port, in violation of the blockade, and that after notification of the blockade the act of sailing to a blockaded port with the intention of violating the blockade is in itself illegal. But neither that case, nor any other that can be cited, has laid it down, that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port. Any such determination would be destructive in many instances of the fair commercial speculations of neutral merchants, to whom it might be of the first importance to possess the opportunity of introducing their goods into the port which had been blockaded, at the very earliest moment after such blockade had been relaxed. Such an object appears to be legal, both from the opinions of Sir *W. Scott* in the case of the *Shepherdess* (b), and from the judgment of Lord *Tenterden* C. J. in *Naylor v. Taylor*. (c) In the present case there was no evidence of any understanding between the contracting parties that the Defendant was to break the blockade of *Terceira* in order to deliver his outward cargo. Indeed the fact of the blockade did not appear to enter into the contemplation of either party, until after the Defendant's son, the captain of the vessel, had signed the charter-party for his father; and upon the evidence the blockade had

(a) 2 *Rob. Adm. Rep.* 110.

(b) 5 *Rob. Adm. Rep.* 264.

(c) 9 *B. & C.* 718.

ceased to be a real and effective blockade long before the charter-party was entered into.

We see, therefore, no reason for holding the contract to be void on the ground of illegality.

As to the second point, it is sufficient to say, that as the blockade had been publicly notified to the government of *England*, the contracting parties must be taken to have entered into the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case the rule of law laid down in *Paradine v. Jane* (a) applies, viz. "That where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

We think, therefore, the rule for a new trial must be refused.

Rule refused.

(a) *Allegn's Rep.* 27.

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SMITH v. WALTON and Another.

Jan. 31.

REPLEVIN for goods.

Avowry and cognizance, that *Smith* occupied the house in which, &c. for a year and a half next before and ending at *Martinmas* 1830, to wit, on the 23d of *November* 1830, as tenant thereof to *Walton*, under and by virtue of a certain demise thereof to him made at and under

taken to mean *New Martinmas*; and Plaintiff having shewn that in fact payable at *Old Martinmas*, the Court refused to set aside a verdict given for him.

Replevin.
Defendant
avowed that
the rent was
payable at
Martinmas, to
wit, Nov. 23.:
Held, that
this must be

the

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the yearly rent of 3*l.* 10*s.*, payable half yearly, that is to say, at *Whitsuntide* and *Martinmas* in every year; and because 5*l.* 5*s.* of the rent aforesaid for the space of one year and a half ending as aforesaid at *Martinmas*, to wit, on the 23d of *November* 1830, and from that time hitherto was and is still due and payable by *Smith*, therefore the Defendants avow and acknowledge the distress.

Plea, *non tenuit modo et formâ*, and issue joined thereon.

Upon this issue a jury having found that the rent was payable at *Old Martinmas*, a verdict was entered for the Plaintiff, which, by leave of the Judge who tried the cause,

Wilde Serjt. obtained a rule *nisi* to set aside, and enter a verdict for the Defendants instead.

Jones Serjt. shewed cause in the last term. Although, upon a parol demise with rent payable at *Lady-day*, evidence of the custom of the country is admissible to shew that by *Lady-day* the parties meant *Old Lady-day*, *Doe d. Hall v. Benson* (a), yet it has been holden that a lease of lands by deed since the new style, to hold from the feast of *St. Michael*, must be taken to mean from *New Michaelmas*, and can not be shewn by extrinsic evidence to refer to a holding from *Old Michaelmas*. *Doe d. Spicer v. Lea*. (b) Now a plea must receive the same construction as a deed; and the Defendants having pleaded that the rent was payable at *Martinmas* must be taken to have pleaded that it was payable at *New Martinmas*, the words, "to wit, on the 23d of *November*," being mere surplusage. But the Plaintiff having proved, and the jury having found, that the rent was really reserved, payable at *Old Martinmas*, the avowry

(a) 4 B. & A. 588.

(b) 11 East, 312.

affords no warrant for the distress, and the verdict for the Plaintiff must stand.

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Wilde. As there are two *Martinmasses*, one which falls on the 11th, and one on the 23d of *November* in every year, the words, "to wit, on the 23d of *November*," are a material part of the plea, inserted for the express purpose of preventing ambiguity, and therefore cannot be rejected as surplusage. If the Defendants had avowed for a rent payable at *Old Martinmas*, they would have been entitled to the verdict. It is the same thing, but expressed with more precision, to say the rent was payable *November 23d.* (a)

Cur. ado. vult.

TINDAL C. J. The question in this case arises upon an avowry and cognizance by the Defendants, in which they allege, that the Plaintiff, for one year and a half next before and ending at *Martinmas* 1830, to wit, on the 23d day of *November* 1830, held and enjoyed the place in which, &c. as tenant thereof to the avowant by virtue of a certain demise thereof to the Plaintiff made, at and under the yearly rent of 3*l.* 10*s.* payable half yearly, that is to say, at *Whitsuntide* and *Martinmas* in every year; and because the sum of 5*l.* 5*s.* of the rent aforesaid for the space of one year and a half ending as aforesaid at *Martinmas*, to wit, on the 23d day of *November* 1830, and from thence, &c. was due and payable, therefore the Defendants avow and acknowledge the distress made. To this avowry and recognizance there was a plea in bar, that the Plaintiff did not hold *modo ac formá*; and upon the trial of an issue joined on this plea the jury found that the rent was payable at *Old Martinmas*, and a verdict was entered for the Plaintiff.

A motion has been made to set aside this verdict, and

(a) But see *Houlden v. Fasson*, 6 *Bingb.* 424.

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to enter a verdict for the Defendants, by leave of the learned Judge who tried this cause; and, after hearing argument against and in support of the rule, the majority of the Judges who heard this argument think the present verdict ought to stand.

The case of *Doe d. Spicer v. Lea* appears to them to be decisive upon the present point. There it was held, that since the existence of the new style sanctioned by act of parliament, a lease by deed, to hold from the feast of *St. Michael*, must be taken to mean *New Michaelmas*, and that extrinsic evidence is not admissible to shew that it means a holding from *Old Michaelmas*. And we think where there is an allegation upon the record that the tenant holds at a rent payable half yearly, that is to say, *Whitsuntide* and *Martinmas* in every year, the same rule which governs the construction of a deed, must govern the construction of a plea, and that it can only be understood to mean *New Martinmas*, there being only one day set down as *Martinmas* in the calendar which forms part of the statute for the alteration of the style. It is true, that in another part of the avowry, distinct from the allegation of the terms of the tenancy, the Defendants state the year's rent for which the distress was taken, to be for a year ending at *Martinmas*, "to wit, on the 23d *November*." But we think ourselves bound to take notice that *Martinmas* falls on the 11th of *November* in every year, by the enactment of the statute above referred to, and that it cannot fall on any other day; and, consequently, that all which follows under the *videlicet*, which is inconsistent with and contrary to such enactment, must be rejected.

Evidence, no doubt, is admissible in the case of a *parol* taking at *Martinmas*, generally, to shew whether the day of taking was intended to be calculated according to the new or old style; indeed, such evidence was admitted in this very case for the purpose of shewing
 that

that the rent was payable at *Old Martinmas*, which the jury found to be so. But no case can be found in which, where a party pleads upon the record that the taking was from *Martinmas*, he has been allowed to shew that he meant by that pleading *Martinmas* according to the old style.

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My brother *Gaslee* thinks the words under the *vide licet* amount, in effect, to a distinct averment, that the word *Martinmas* in the pleading so explained, means the feast of *Old Martinmas* which falls upon the 23d of *November*; and that the allegation in the first part of the avowry, that the holding was for a period ending at *Martinmas*, viz. "the 23d of *November*;" and again, a similar allegation in the latter part of the pleadings, shew that the word *Martinmas* mentioned in the reservation of rent, must be intended to apply to the same day, that is, *Old Martinmas*. He agrees with the rest of the Court in the opinion, that no extrinsic evidence ought to be received to explain the record.

Rule discharged.

DOE v. HARVEY.

Jan. 31.

TRESPASS for *mesne profits*.

At the trial before *Alderson J.*, at the last *Somerset assizes*, the Plaintiff, after proving that the Defendant had occupied the premises in question from *May 1829* to *May 1830*, offered in evidence a judgment in an ejectment brought for the same premises by the Plaintiff in this action against *Simon Payne(a)*, and called as a witness the son of *Simon Payne*, who stated that he,

Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession.

(a) See *Doe v. Whitcombe*, ante, 46.

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 }
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the son, had put the defendant in possession. It appearing, however, that this had been done under a written agreement, which was not produced, it was objected, on behalf of the Defendant, that the witness could not, while that instrument existed, by parol evidence, disclose under whom the Defendant held, and that without evidence that the Defendant held under *Payne*, the judgment against *Payne* could not be produced against the Defendant. And the learned Judge being of this opinion nonsuited the Plaintiff.

Wilde Serjt. obtained a rule *nisi* to set aside this nonsuit, against which rule

Stephen Serjt. argued last term that the written agreement was the best evidence to shew under whom the Defendant held, and that the agreement being in existence and not produced, parol evidence to that point was properly excluded. Then, with respect to the judgment against *Payne*, he contended, as in *Doe v. Whitcombe*, and on the authorities there cited, that the Defendant not having been shewn to be party or privy, the judgment was no evidence against him.

Wilde. Parol evidence of any of the stipulations in the written agreement could not be received; but it was competent to the Judge to admit evidence of facts independent of the agreement; as, who professed to be landlord and received the rent. Those were facts which could not alter or interfere with any stipulation in the agreement, and might, therefore, be proved by other evidence. In *R. v. Holy Trinity, Hull* (a), it was held that parol evidence of the fact of tenancy was admissible, although the tenant held under a written

(a) 7 B. & C. 611.

agreement, and *Bayley* J. said, "The general rule is, that the contents of a written instrument cannot be proved without producing it. But, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol, without proving the terms of it. It was unnecessary in this case to prove by the written instrument, either the fact of tenancy or the value of the premises." And *Park* and *Gaselee* Js. held the same opinion in *Strother v. Barr* (a).

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 }
 DOK
 v.
 HARVEY.

Cur. adv. vult.

TINDAL C. J. This was an action of trespass for the *mesne* profits, upon the trial of which it was proved, that *Harvey*, the Defendant, had occupied the premises in question from *May* 1829 to *May* 1830. The Plaintiff, in order to prove his right to the possession of the premises during that period, offered in evidence, a judgment in ejectment brought for the same premises by the present Plaintiff, against one *Payne*. It was objected that this record was not admissible in evidence against the present Defendant, he not being the Defendant in the original cause, nor shewn to claim through or under him. The only evidence that was given as to the origin or nature of *Harvey's* occupation was, that one *Henry Payne*, the son of the Defendant in the ejectment, had put him into possession. But as it appeared from the same witness that he had been put into possession under a written agreement, which agreement was not produced, the parol evidence of *Henry Payne*, as to the landlord under whom he held, or the terms under which he was let into possession, was deemed insufficient for that purpose. The learned Judge, who tried the cause, held, under these circumstances, the record of the judgment

(a) 5 *Bingh.* 136.

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in ejectment to be inadmissible in evidence in this cause, and the Plaintiff was thereupon nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for the Plaintiff.

After hearing the arguments against and in support of this motion, we are of opinion that the direction of the Judge upon both the points so made at the trial was right. As to the first point, if nothing had been in issue but the single fact, whether *Harvey* held or occupied the land, such fact might undoubtedly be proved by the payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appeared that he held under an agreement in writing. Authorities to this effect were cited in argument at the bar. But here the question was, not merely whether *Harvey* held the premises, but whether he held them as tenant to *Payne*; and of this fact there was no other evidence admissible than the written agreement, which was not produced.

The second point is simply this, whether in an action of trespass for the *mesne* profits, a recovery in ejectment against a former tenant in possession, is producible in evidence against a person who is afterwards found in possession, without proving that he came in under the Defendant in ejectment, so as to make him a privy to the judgment in ejectment. And we are all of opinion, that it is not. A recovery in ejectment is conclusive evidence both of the Plaintiff's right to the possession, and that the Defendant is a trespasser in an action for the *mesne* profits brought against the person who was Defendant in the original action of ejectment: *Aslin v. Parkin* (a). According to the resolution of the Judges, "the tenant is concluded by the judgment, and cannot controvert the title." But no reason has

(a) 2 Burr. 668.

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been urged, nor any authority cited at the bar, to shew that this judgment is to be considered as differing from judgments in other personal actions; and the general rule of law is, that judgments bind only parties and privies; but as to strangers are considered as *res inter alios acta*, and are not producible in evidence against them. In the case of *Denn v. White and Wife* (a), it was held by the Court that in an action of trespass for the *mesne* profits against husband and wife, a judgment in ejectment against the wife could not be given in evidence against the husband, *because he was no party to that suit*: and again, in *Hunter v. Britts* (b), it was held by Lord *Ellenborough*, in an action of trespass for the *mesne* profits brought against the landlord of the premises, who had been in the receipt of the rents and profits from the time of the demise till the writ of possession was executed, that a judgment in ejectment against the casual ejectors was not admissible in evidence against him, without proof that the tenant upon whom the ejectment was served, had given him notice of it. And this appears to have been on the ground, that he was not privy to the judgment.

The only proof in this action, that the Defendant is a trespasser, or that the Plaintiff has a right to the possession, is by the production of the judgment against *Payne*. But as the Defendant is a stranger to *Payne* upon the evidence before the Court, no admission made by him, and no judgment obtained against him, ought to affect *Harvey* until he is shewn to be privy in estate with *Payne*. We therefore think the rule should be discharged.

Rule discharged.

(a) 7 T. R. 112.

(b) 3 Campb. 456.

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Jan. 28.

MILLER v. TRAVERS and Others (a).

Devise of all testator's freehold and real estates in the county of *L.* and city of *L.* Testator had no estates in the county of *L.*; a small estate in the city of *L.*, inadequate to meet the charges in the will; and estates in the county of *C.* not mentioned in the will: Held, that the devisee could not be allowed to shew by parol evidence, that the estates in the county of *C.* were devised to him

in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in county *C.*: that by mistake he erased the words *county of C.*; and that testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of *C.*

TINDAL C. J. In this case the Plaintiff, *John Riggs Miller*, filed his bill against the Defendants for the purpose of establishing the will of the late Sir *John Edward Riggs Miller*, Bart., and for carrying into execution the trusts thereof. One of the Defendants, *Elizabeth Wheatley*, was the sister and heiress at law of the testator. And upon the hearing of the cause before His Honor the Vice-Chancellor, after the answers of the several Defendants, and amongst others, the answer of the Defendant, *Elizabeth Wheatley*, had been put in, and witnesses examined, His Honor ordered, amongst other things, "That the parties should proceed to a trial at law on the following issue; viz. Whether Sir *John Edward Riggs Miller*, Bart. did devise his estates in the county of *Clare*, and in the county of *Limerick*, and in the city and county of the city of *Limerick*, or either and which of them, to the trustees mentioned in his will, and their heirs;" in which issue the Plaintiff in the cause was to be the Plaintiff, and the heiress at law and her husband Defendants.

(a) The Lord Chief Justice of the Court of Common Pleas, and the Chief Baron of the Court of Exchequer, Lord *Lyndhurst*, having been called on to assist the Lord Chancellor in the case of *Miller v. Travers and Others*, their joint opinion was delivered as above in the Court of Chancery by the Lord Chief

Justice, on the 28th of *January*. As this opinion is on a subject strictly relating to proceedings at common law, and the case, which is fully stated above by the Lord Chief Justice, is of the highest importance, it has been thought advisable to give it a place in these reports.

Against

Against this part of the decree the Defendant, *Elizabeth Wheatley*, has appealed, and prays a rehearing of the cause so far as respects that part.

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v.
TRAVERS.

Upon the hearing of this petition of appeal, the Lord Chancellor has been pleased to request the assistance of the Lord Chief Baron and myself; probably foreseeing, as the case has appeared in the result, that the propriety of directing an issue, at least as to the devise of the estates in the county of *Clare*, which was the main point in contention between these parties, would depend upon the nature of the evidence to be brought forward by the Plaintiff, upon whom the affirmative in such issue would rest.

For if the evidence, and the only evidence which can possibly be brought forward by the Plaintiff in support of his proposition, is of such a nature and description as to be inadmissible at the trial of the cause, it would be the duty of this Court to refuse the issue; it being manifestly to the advantage of both parties that such question should be decided in the first instance by the Judge sitting in equity, rather than that the very same question should be decided upon the very same principles of evidence by the Judge at *Nisi Prius*, after an expense and delay that must be worse than useless to all concerned in the suit.

Now the main question between the parties, and which has formed the principal subject of argument before us, is this, Whether parol evidence is admissible to shew the testator's intention that his real estates in the county of *Clare* should pass by his will? There is a subordinate question as to the due execution of one sheet of the will, to which we shall afterwards advert, and upon which question an issue of a different and more limited form than that which has been at present directed, may perhaps properly be granted, if the Plaintiff thinks fit to insist upon it; but the great contention
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between the parties is upon the question above proposed, as to the admissibility of parol evidence with respect to the estates in *Clare*.

This question arises upon facts, either admitted or proved in the cause, which are few and simple.

The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate in the county of *Limerick*, and in the city of *Limerick*," to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county of *Limerick*, but he had a small real estate in the city of *Limerick*, and considerable real estates situate in the county of *Clare*.

The real estate in the city of *Limerick* is admitted to have passed under the devise; but the Plaintiff contends that he is at liberty to shew by parol evidence that the testator intended his estates in *Clare* also to pass under the same devise.

The general character of the parol evidence which the Plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of *Limerick* is so small, and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to shew what that mistake was, the Plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estates whatsoever situate in the counties of *Clare*, *Limerick*, and in the city of *Limerick*;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such
alterations

alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words "counties of *Clare*," and substitute the words "county of" in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The Plaintiff further proposes to prove, that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken, for the purpose of the argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in *Clare* in the devise to the trustees. Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shewn from the description of the property in the city of *Limerick*, that *some* mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of *Limerick*, and as the intention of the testator to devise any estate in the county of *Clare* cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given.

It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what

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what was the estate or subject matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim "*Ambiguitas verborum latens, verificatione suppletur.*"

But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of *Dale*, and at his death it is found that he has two manors of that name, *South Dale* and *North Dale*: or where a man devises to his son *John*, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to shew which manor was intended to pass, and which son was intended to take. (*Bac. Max.* 23. *Hob. Rep.* 32. *Edward Altham's case*, 8 *Rep.* 155.) The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part but not true in every particular. As where an estate is devised called *A.*, and is described as in the occupation of *B.*, and it is found, that though there is an estate called *A.*, yet the whole is not in *B.*'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to shew what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication

indication of intention appearing on the face of the will to justify the application of the evidence.

But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in *Clare*. The present case is rather one in which the Plaintiff does not endeavour to apply the description contained in the will to the estates in *Clare*, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself.

The testator devises all his estates in the county of *Limerick* and the city of *Limerick*. There is nothing ambiguous in this devise on the face of the will. It is found, upon enquiry, that he has property in the city of *Limerick* which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city of *Limerick*, but passes no estate in the county of *Limerick*, where the testator had no estate to answer that description.

The Plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of *Limerick*, but an estate in a county not named in the will, namely, the county of *Clare*, and that the will is to be read and construed as if the word *Clare* stood in the place of or in addition to that of *Limerick*.

But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent

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parent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. *Denn v. Page. (a)*

But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of *Clare* was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the statute of frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why

(a) 3 T. R. 87.

not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made *in form* by the testator in his lifetime, would *really* be made by the attorney after his death; that all the guards intended to be introduced by the statute of frauds would be entirely destroyed, and the statute itself virtually repealed.

And upon examination of the decided cases on which the Plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to, — that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

Thus, in the case of *Lowe v. Lord Huntingtower* (a), in which it was held that evidence of collateral circumstances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke in 8 Rep. 155., “*stand well* with the words of the will.”

The case of *Standen v. Standen* (b) decides no more, than that a devise of all the residue of the testator's real

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(a) 4 Russ. Rep. 581 n.

(b) 2 Ves. jun. 589.

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parent upon the face of the will. It is out has a power moving a difficulty, arising from a description of such estate description; it is making the will though the power is not on which it is altogether silent. upon the principle that as the filling up a blank which is inoperative, unless it is left in his will. It amounts to an addition in the will, the testator of parol evidence, to the effect of appointment. testator, which he is not to do. *Massey and Others* (a) does not

Now, the first question now under consideration is, that if the parol evidence had established that the son and sense of the two estates mentioned in the will established by mistake, the county of *Radnor* the testator intended to be applied to the estate in *Monmouth*, and vice versa, the Court held that it was sufficiently to be collected from the words of the will itself, which estate the

B cannot be said to give to the one devisee, and which to the other, independent of their local description: all, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will.

In the case of *Selwood v. Mildmay* (b) the testator devised to his wife part of his stock in the 4 per cent. annuities of the Bank of *England*; and it was shewn by parol evidence, that at the time he made his will, he had no stock in the 4 per cent. annuities, but that he had had some, which he had sold out, and had invested the produce in long annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the long annuities, it was held that such stock should pass rather than the will be altogether inoperative.

This case is certainly a very strong one; but the decision

(a) 8 East, 149.

(b) 3 Ves. jun. 306.

to us to range itself under the head, that
quod non nocet," where enough appears
 to shew the intention after the false

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Edtitle v. Southern (a) falls more closely
 in principle last referred to. A devise "of all
 in called *Troques Farm*, now in the occupa-
 tion of *A. C.*" Upon looking out for the farm devised,
 the plaintiff found that part of the lands which constituted
Troques Farm are in the occupation of another person.
 It was held, that the thing devised was sufficiently ascer-
 tained by the devise of "*Troques Farm*," and that the
 inaccurate part of the devise might be rejected as sur-
 plusage.

The case of *Day v. Trigg (b)* ranges itself precisely in
 the same class. A devise of all "the testator's freehold
 houses in *Aldersgate-street*," when in fact he had no
 freehold, but had leasehold houses there. The devise
 was held in substance and effect to be a devise of his
 houses there; and that as there were no freehold houses
 there to satisfy the description, the word "freehold"
 should rather be rejected than the will be totally void.

But neither of these cases afford any authority in
 favour of the Plaintiff; they decide only that where
 there is a sufficient description in the will to ascertain
 the thing devised, a part of the description which is
 inaccurate may be rejected, not that any thing may be
 added to the will; thus following the rule laid down by
Anderson C. J. in *Godb. Rep.* 131.: — "An averment to
 take away surplusage is good, but not to increase that
 which is defective in the will of the testator."

On the contrary, the cases against the Plaintiff's
 construction appear to bear more closely on the point.
 In the first place, it is well established, that where a

(a) 1 M. & S. 299.

(b) 1 P. Wms. 286.

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complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. *Hunt v. Hort* (a), and in many other cases.

Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in *Clare*.

In the case of *Doe d. Oxenden v. Chichester* (b) it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of "my estate of *Ashton*," no parol evidence was admissible to shew that the testator intended to pass not only his lands in *Ashton*, but in the adjoining parishes, which he had been accustomed to call by the general name of his *Ashton* estate.

The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, "If a testator should devise his lands, of or in *Devonshire* or *Somersetshire*, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties." Lord *Eldon*, then Lord Chancellor, in page 90. of the Report, had stated in substance the same opinion. The case so put by Lord *Eldon* and the Chief Justice is the very case now under discussion.

But the case of *Newburgh v. Newburgh*, decided in the House of Lords on the 16th of June 1825, appears to be in point with the present. In that case the appellant contended, that the omission of the word "*Gloucester*" in the will of the late Lord *Newburgh* proceeded upon a mere mistake, and was contrary to the intention

(a) 3 Bro. C. C. 311.

(b) 4 Dow. P. C. 65.

of the testator, at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in *Gloucester*, which was not inserted in the will, as in the county of *Sussex*, which was mentioned therein.

The question, "whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the *Gloucester* estate, as if the word '*Gloucester*' had been inserted in the will," was submitted to the Judges, and Lord Chief Justice *Abbott* declared it to be the unanimous opinion of those who had heard the argument, that it could not.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the Plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the Vice-Chancellor.

Upon the second point that has been made, namely, whether the sheet of the will numbered 20. forms any part of the will,—although we cannot but form a strong opinion from the evidence in the cause as to the result of such an issue, still as it is a question merely of fact, and one upon which by possibility further evidence might be produced, we think an issue might properly be allowed, directed, and limited to the precise investigation of that single fact.

Some arguments were offered by the Plaintiff's counsel upon the construction of the will from the context of the whole instrument; and it was contended, that without the introduction of any extrinsic evidence, the estates in *Clare* would pass under the will; but as the state of

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the cause at the time of the hearing did not admit of such discussion, and as the counsel for the defendants disclaimed entering upon it at present, we have, in fact, not heard the parties on that point, and we therefore think it right to forbear offering any opinion thereon.

The LORD CHANCELLOR expressed his concurrence in the opinion delivered as above, and after adverting to some of the cases cited, said, — The result will be, that the issue cannot be granted as ordered by his Honor the Vice-Chancellor; but upon the other point, whether the sheet marked No. 20. formed a part of the will at the time of the execution, the parties, if they think it worth their while, may have an issue.

Whether the whole instrument taken together, and without going out of it, was sufficient to pass the estates in *Clare*, is a point which has not been argued here, and on which we give no opinion.

Order of the Vice-Chancellor reversed.

Jan. 25.

BAYNON v. BATLEY.

1. Adultery of the wife after separation, no plea to a covenant to pay a trustee a separate maintenance for the wife.

2. A declaration alleging, that

by indenture *purporting* to be made between Plaintiff and Defendant, it was *witnessed* that Defendant covenanted, Held, after plea, sufficiently certain.

THE declaration stated that on the 30th of *January* 1826, at *London*, by a certain indenture then and there *purporting* to be made between the Defendant, of the first part, *Awdry Ann Batley*, wife of the Defendant, of the second part, the Plaintiff, of the third part, and one *William Batley* and *Henry Batley* of the fourth part, one part of which indenture, sealed with the seal of the Defendant, the Plaintiff there brought

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into Court, the date whereof was a certain day and year therein in that behalf mentioned, to wit, the same day and year aforesaid, — After reciting a disagreement between Defendant and his wife, and an agreement by him to make her a separate allowance by an annual payment of 240*l.* to the Plaintiff as her trustee, the Plaintiff undertaking to indemnify Defendant against half his wife's debts, — *it was witnessed* that, in pursuance of the said recited agreement, and in order in part to effectuate the same, and make such provision for the said *Awdry Ann Batley* as thereafter expressed, and in consideration of the sum of 10*s.* of lawful money of *Great Britain*, by the Plaintiff to the Defendant in hand paid, at or before the execution of the indenture, the receipt whereof was by the said indenture acknowledged, the Defendant did, for himself, his heirs, executors, and administrators, amongst other things covenant, promise, and agree, to and with the Plaintiff, his executors, administrators, and assigns, in the manner following, that is to say, that he, the Defendant, should and would well and truly pay, or cause to be paid to the Plaintiff, his executors, administrators, and assigns, the said annuity or clear yearly sum of 240*l.*, for and during the term of the natural life of the Defendant, in case the said *Awdry Ann Batley* should so long live. Averment of the separation of the wife, and that she was still living. Breach, nonpayment. Pleas, first, *non est factum*; secondly, that after the execution of the indenture, and before the sum claimed became payable, the said *Awdry Ann Batley*, wife of the Defendant, had committed adultery with one *Alfred Talbois*. Demurrer and joinder.

Spankie Serjt. was to have argued in support of the demurrer. But the Court called on

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Taddy Serjt. to support the plea, asking him if he could distinguish the case from *Jee v. Thurlow*. (a) *Taddy* admitted that he could not, and abandoned the plea, but objected that the declaration was ill, for instead of alleging positively that the Defendant by indenture did covenant, it only alleged that by indenture, *purporting* to be made between the Plaintiff, Defendant, and others, it was *witnessed* that the Defendant did covenant; leaving the covenant, therefore, a matter of inference rather than of positive allegation.

Spankie. The objection lies only on special demurrer. It is cured by pleading over. *Com. Dig. Pleader, C. 65. Dyer, 15. a.*

The *Court* thought there was nothing in the objection, observing that the Plaintiff had made *profert* of the indenture, and the Defendant had recognized it by pleading the adultery "after the making of *the said indenture*."

Judgment for the Plaintiff.

(a) 1 B. & C. 547.

Jan. 28.

GARRARD v. WOOLNER and Another.

The Plaintiff
and other cre-
ditors of the
Defendants
signed resolu-

THE Plaintiff sued on two bills of exchange for 500*l.* each, drawn by *George Loft*, the 24th of October and 27th of November 1828, on the Defendants, upon their property being assigned to trustees for the payment of the creditors.

The Defendants and their trustees having refused to allow the Plaintiff to come in as a creditor under the deed, Held,

That he might sue Defendants notwithstanding the execution of the resolutions.

by

by them accepted, payable four months after date, and by *Loft* indorsed to the Plaintiff.

At the trial before *Tindal C. J.*, *London* sittings after *Michaelmas* term, the grounds of defence were two: 1st, Usury between the Plaintiff and *Loft*, which was not established to the satisfaction of the jury; and, 2dly, That the Plaintiff, in conjunction with other creditors of the Defendants, had, before the action, been a party to certain resolutions for the assignment of the Defendants' estate in trust for the payment of his creditors. As to which, the facts were as follows: —

The Defendants stopped payment shortly before their acceptances became due, and at their request the Plaintiff, on the 9th of *March* 1829, attended a meeting of the Defendants' creditors at the office of Mr. *Parnther* the Defendants' attorney, when it was resolved that their property should be assigned to trustees, and be by them disposed of in the same way as if a commission of bankrupt had then issued against them, and that the creditors should execute a composition-deed. The Plaintiff was put down as a creditor for 1000*l.*, and some days afterwards signed the resolutions which had been come to as above, and had been executed by many other creditors. They were signed by two more creditors after the Plaintiff. But not by the Defendants.

On the 19th of *May* the Defendants requested the Plaintiff to sign their composition-deed, and stated that, upon doing so, he would receive a dividend of 5*s.* in the pound.

The trustees under the deed, however, refused to allow a dividend to the Plaintiff on a greater sum than 782*l.*, alleging that the Plaintiff had received from *Loft* 218*l.*, on account of the bills of exchange, before the 9th of *March*, the day when the Plaintiff proved his debt against the Defendants upon the creditors coming to resolutions as above.

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The Plaintiff asserting that he had not received the 218*l.* till after the 9th of *March*, in which case he was by law entitled to a dividend on the fall 1000*l.*, refused to accept a dividend on less, or to sign the composition-deed, unless on those terms.

On the 11th of *August* 1829, he wrote to require dividends on the whole, and to threaten an action against the Defendants, when their attorney, Mr. *Parnther*, answered him on the 12th as follows:—

“In answer to your letter of yesterday, asking whether you are to be paid dividends on the 1000*l.*, and stating, that if not, you will take out a writ against the Messrs. *Woolner* without delay, I am compelled to say that you never can be admitted a creditor for a sum not due to you; you must deduct from the 1000*l.*, the 218*l.* received by you in part payment prior to their failure.”

Matters were in this state when *Loft* became a bankrupt, and upon his examination, made statements which induced the Defendants' trustees to believe that the bills accepted by the Defendants had been drawn by *Loft* in pursuance of an usurious contract between him and the Plaintiff.

In consequence of this, their attorney, Mr. *Parnther*, on the 27th of *February* 1830, addressed the following letter to the Plaintiff's attorneys:—

“Messrs. *Woolner*'s trustees are of opinion that, after the evidence given by Mr. *Loft* before the commissioners at their last meeting, they would not be justified in allowing Mr. *Garrard* to rank as a creditor. If you should be desired by Mr. *Garrard* to proceed against Messrs. *Woolner*, I will thank you to send the writ to me.”

Upon which the Plaintiff commenced this action.

The Defendants' composition deed, by which they covenanted to carry on their business for the benefit of their creditors, and which contained a clause rendering it void if

if not signed before a given time by *all* creditors within 300*l.* of the total amount of the debts due, was never signed by the Plaintiff or the Defendants.

A verdict was found for the Plaintiff, with leave for the Defendants to move to set it aside, on the ground that the Plaintiff, by having signed the resolutions of *March 9. 1829*, was estopped to bring this action.

Taddy Serjt. having obtained a rule *nisi* accordingly,

Wilde Serjt., who shewed cause, contended, that the Plaintiff having been rejected as a creditor by the Defendants and their trustees, was released from the operation of the resolutions of *March 9. 1829*. The Defendants could not in the same breath deny him to be a creditor, and yet seek to bind him by resolutions which applied to none but creditors. In all the cases in which a creditor has been held bound by a composition deed or agreement, something has been done under the instrument for the benefit of the creditor; *Tatlock v. Smith*. (a) Here it is proposed to bind the Plaintiff without any consideration at all. He is remitted to his rights by the Defendants having departed from the contract. *Cranley v. Hillary* (b), *Boothbey v. Sowden* (c), *Ex parte Vere* (d), *M'Kenzie v. M'Kenzie*. (e) The Court here interposed, and called on

Taddy. It is not contended that the Plaintiff's claim is *discharged* by his being a party to the resolutions of *March 1829*; but inasmuch as he has thereby induced other creditors to acquiesce in a composition, and has been the occasion of their losing their immediate and separate remedy against the Defendants, his right to sue

(a) 6 *Bingb.* 339.

(b) 2 *M. & S.* 120.

(c) 3 *Campb.* 175.

(d) 1 *Rose*, 281.

(e) 16 *Fes.* 372.

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is *suspended* till the trusts of the composition deed have been executed. This was the principle on which *Tatlock v. Smith* was decided. There, by an agreement between the defendants and their creditors, all the defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors, and the defendants were to execute to trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses. The trustees carried on defendants' business, and paid the creditors 10s. in the pound; they then tendered for execution by the defendants a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance. The instrument not having been executed by all the creditors, a meeting, at which the defendants were called on to execute was adjourned, that the signature of every creditor might be obtained. It was held, that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least, till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants.

There, as in the present case, the deed was to be void if not signed by all the creditors; and yet it was held, that the Plaintiff's right of action was suspended, though not extinguished. And *Boothbey v. Sowden* is an authority that the signature by other creditors is sufficient consideration for such an agreement.

In *Cork v. Saunders* (a), a trader, being insolvent, by agreement stipulated to assign his property immediately, the creditors consenting that the business should be carried on for their benefit until the next *Michaelmas*, and that then the property should be divided amongst them: the insolvent assigned his effects: at the next

(a) 1 B. & A. 46.

Michaelmas

Michaelmas several of the creditors who had signed that instrument, agreed that the business should be carried on by the trustees for a further time: and it was held, that a creditor who had signed the first agreement, but who had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement. Lord *Ellenborough* said, "The plaintiff, by the terms of the agreement, consents that the property of the defendant shall be assigned, and be in the management, exclusively, of the defendant, under the directions of the trustees, until *Michaelmas*. How can the plaintiff, then, replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if all the other parties could have been placed in their original situation, but that is impossible. This is an anomalous case, in which the plaintiff cannot stand in his former situation; nor can I say at present that the whole shall be nullified." Bayley J. said, "By the terms of the agreement, it is stipulated that the farming concerns shall be carried on until *Michaelmas*, for the benefit of the creditors who might concur; and it contains a further stipulation, that the debtor shall assign all his estate *immediately*: the consequence of which would be that he would thereby divest himself of all means of payment. It is true, that the defendant remains in possession; but as servant only, to the trustees; he has not a single article of property which he can appropriate to the payment of his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them; this they neglect to do, and they postpone the period at which they ought to sell. The non-division, however, of the property cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to me that their only remedy

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medy is in equity." And *Abbott J.* added, "It is said, as the trustees did not sell at *Michaelmas*, the plaintiff may now sue; but how can the debtor get back his effects? We think, therefore, that the circumstance of the plaintiff's not having concurred in postponing the sale does not remit him to his original right of action."

Here, the creditors cannot be replaced in their original situation, and the Plaintiff, by executing the resolutions, having contributed to place them in their present position, cannot now recede from his contract, though it may turn out that he need not have signed it, and is precluded from resorting to the common fund. He must wait till the engagements contracted by the resolutions have been discharged.

TINDAL C. J. The signature of the resolutions, and the circumstances which followed, do not amount to a bar of the Plaintiff's claim in this action. The Defendants contend, that a party who concurs in resolutions for a distribution of the property of his debtor brings himself within the operation of a subsequent deed by which the debtor's property is assigned for the benefit of the creditors at large, and that his separate right is thereby suspended till the creditors are satisfied, or, at least, placed in the situation in which they originally stood. As a general proposition this is true, but it is not true where the party, by the act of the debtor, is prevented from taking the benefit of the deed. See how the matter stands in this case. The Plaintiff, a creditor of the Defendants, enters, with other creditors, into general resolutions as to the disposition of the debtor's property. Some time afterwards the amount of the Plaintiff's claim is contested, and ultimately the Defendants and the trustees under the deed of assignment determine that the Plaintiff shall not stand in the character of a creditor

creditor at all; thereby denying him every right with a view to which he signed the preliminary resolutions. He may, therefore, contend that, as far as he is concerned, the resolutions have never been carried into effect at all. I agree that the other creditors are estopped to raise a similar objection, for they have had the benefit of a dividend under the deed: but how can it operate as an estoppel to the Plaintiff, who, by the trustees themselves, has been prevented from deriving any benefit under it? Besides this, the Plaintiff has been put out of the resolutions by an original act of the Defendants and the trustees; for by a letter written on the 27th of *February* he is expressly told that "Messrs. *Woolner's* trustees are of opinion that, after the evidence given by Mr. *Loft* before the commissioners at their last meeting, they would not be justified in allowing Mr. *Garrard* to rank as a creditor." What is that but a consent on their part that he shall be discharged from any participation in the general resolutions? Although it is a fraud on the other creditors, if a party who has concurred in recommending a distribution of the debtor's property refuses to come in on the same terms with the rest, it can be no fraud where he is prevented from deriving any advantage from the general distribution. Thus in *Boothbey v. Sowden*, Lord *Ellenborough* says, "If the plaintiffs could shew that the defendant had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy; but I think that remedy is suspended by the agreement, unless an infraction of the agreement on the part of the defendant is proved by the plaintiffs." Here there has been an infraction of the terms of the agreement by the refusal to permit the Plaintiff to proceed under it. The rule, therefore, which has been obtained for a new trial must be discharged.

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PARK J. I am of the same opinion. The whole turns on this: have the Defendants kept to their own agreement? They refuse to let the Plaintiff prove under the deed of assignment, and yet they say his right to sue them is suspended. The letter referred to by the Chief Justice settles the whole, for the Plaintiff is there told that "Messrs. Woolner's trustees are of opinion that, after the evidence given by Mr. Loft before the commissioners at their last meeting, they would not be justified in allowing Mr. Garrard to rank as a creditor." The cases of *Boothbey v. Sowden* and *Cranley v. Hillarey* go the whole length of the present. In *Boothbey v. Sowden* Lord *Ellenborough* said, "If the plaintiffs could shew that the defendants had refused to give them the notes according to the terms of the agreement, they might be remitted to their original remedy. But I think that remedy is suspended by the agreement, unless an infraction of the agreement on the part of the defendants is proved by the plaintiffs." Here the Defendants have neither signed the deed nor allowed the Plaintiff to come in under it. Mr. *Topping* contended, in *Cranley v. Hillarey*, that "no infraction was proved; on the contrary, it appeared that the notes were ready for the plaintiff, who might have received them upon applying for them; but he never did make application." But Lord *Ellenborough* said, "The rule is, that the person to be discharged is bound to do the act which is to discharge him, and not the other party. If the defendant had offered the notes at the time of action brought, it might have been a ground for staying the proceedings." And *Dampier J.* said, "It is laid down by *Littleton* (s. 340.), that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in *England*, and at the set day to tender him the money, otherwise he shall forfeit the bond. So in this case, the defendant was to give the notes, and, there-

therefore, to go with them to the plaintiff, and he was not to go to the defendant." In *Cork v. Saunders* the defendant had signed the deed, and the plaintiff having concurred in it, the Court would not remit him to his right.

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BOSANQUET J. I am of the same opinion. It is admitted that the Plaintiff's debt is not extinguished, but it is contended that it has been suspended. How? Supposing any contract to that effect could be implied between the Plaintiff and the Defendants, the Plaintiff has been denied the benefit of the agreement, for by *Parnter's* letter he is told, that "Messrs. *Woolner's* trustees are of opinion that, after the evidence given by Mr. *Loft* before the commissioners at their last meeting, they would not be justified in allowing Mr. *Garrard* to rank as a creditor." Upon this, it must be taken that his concurrence in the resolutions was repudiated; and having consented to such repudiation, he is entitled to proceed as if no agreement had subsisted between him and the Defendants.

ALDERSON J. If the Defendants had in all things conformed to the resolutions, the Plaintiff's right to sue might perhaps have been suspended; but they cannot exclude the Plaintiff from claiming under the deed, and at the same time suspend his right to sue.

Rule discharged.

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BARTHROP and Others, Assignees of YATES, a Bankrupt, v. ANDERTON.

Where in an action by the assignees of a bankrupt the bankruptcy is disputed, but the cause is referred to arbitration, the Judge before whom the cause is opened cannot certify under 6 G. 4. c. 16. s. 90. for the costs of proving the bankruptcy, although upon referring, the Defendant agrees to admit the validity of the commission.

IN this cause the Defendant's attorney had given notice to dispute the trading of *Yates*, the commission, the petitioning creditor's debt, and the act of bankruptcy.

At the last *York* assizes, the cause was referred to arbitration by an order of *Nisi Prius*, containing the following clause: "And it is agreed between the parties, that the bankruptcy of *W. Yates* shall be admitted, and the arbitrator shall state upon his award any point of law that he shall think fit for the consideration of the Court, or that either of the parties shall require."

Parke J., before whom the cause was to have been tried, having certified for costs for the Plaintiff under 6 G. 4. c. 16. s. 90., which enacts, "that in any action by or against any assignee, or in any action against any commissioner, or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required at the trial of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy respectively, unless the other party in such action shall, if Defendant, at or before pleading, and if Plaintiff, before issued joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the Judge, before whom the cause shall be tried, may, if he thinks fit, grant a certificate of such proof or admission; and such assignee, commissioner, or other person shall be entitled to the costs

costs, to be taxed by the proper officer, occasioned by such notice ;”

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Wilde Serjt. obtained a rule *nisi* to set aside this certificate, on the ground that as the Judge had not tried the cause, the statute did not authorize him to give the certificate. The attorney for the Defendant deposed, that when the Plaintiffs' counsel had opened the cause, the Defendant's counsel proposed a reference on the usual terms, of all matters in difference, including the validity of the commission of bankrupt, trading, the petitioning creditor's debt, and act of bankruptcy ; that the Plaintiffs' counsel agreed to this, if the Defendant would admit the bankruptcy before the arbitrator ; which being assented to, the reference was proceeded with.

Jones Serjt. shewed cause upon an affidavit which stated, that upon the opening of the cause the Defendant's counsel admitted the validity of the commission, upon which the Plaintiffs agreed to a reference. He therefore contended, that the admission having been made in the presence of the Judge, the Judge had authority to grant the certificate : it was not necessary that he should try the cause through. The statute was remedial, and it was sufficient for the purpose of the certificate that the Judge should be satisfied by proof or admission that the commission of bankrupt was valid, whatever might be the result of the other points in issue in the cause.

TINDAL C. J. This question depends on the construction of the ninetieth section of the statute of 6 G. 4. c. 16., by which it is enacted, that where notice has been given to dispute a commission of bankruptcy, if the “ assignee, commissioner, or other person shall prove

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the matter so disputed, or the other party admit the same, the Judge before whom the cause shall be tried may, if he think fit, grant a certificate of such proof or admission, and such assignee, commissioner, or other person, shall be entitled to the costs."

Words cannot shew more distinctly, that a discretionary power is vested in the Judge. But, unless he tries the whole cause, he cannot exercise that discretion properly. It has been argued, that in respect of the costs incurred for proving the commission, it is sufficient that the commission has been admitted. But many cases may be conceived in which it would not be proper to give those costs, although the commission may have been admitted: as where a Defendant may have been deceived as to the act of bankruptcy, and upon discovering his error in court, at once makes the due admission. The discretion, therefore, vested in the Judge, by the words "*may if he think fit,*" cannot safely be exercised unless he try the cause. He has the same discretion with respect to the costs of a special jury, for which it has never been the practice to certify when the cause is referred.

PARK J. The act says, the certificate may be granted by the Judge before whom the cause *shall be tried*, if he think fit. The clause is cautiously worded to enable the Judge to decline, if he think fit, even when the cause has actually been tried; but it is impossible to say that this cause was tried before the Judge.

BOSANQUET J. It is clear that this certificate was not given by a judge before whom the cause was tried. The statute intended that he should have a discretion which he cannot properly exercise unless he tries. Nor can it be said that the admission here was made on the trial

trial of a cause. A party may often admit, with a view to a reference, a fact which it might be expedient to dispute if he proceeded to trial.

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ALDERSON J. The moment it is established that the Judge must exercise a discretion, there is an end of this question; for he cannot exercise his discretion without trying the cause: and as to admissions, they are often made for the purpose of argument. In this case, it might well happen that the Defendant admitted the bankruptcy, because he had a good defence on the contract, and therefore abstained from troubling the Plaintiff to prove the bankruptcy.

Rule absolute.

LEWIS v. KNIGHT.

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MEREWETHER Serjt. on the part of the Defendant, a feme covert, had obtained a rule to cancel an undertaking for a bail-bond given by her attorney to the sheriff; and to stay all proceedings on the Defendant's filing a common appearance, the Plaintiff having been aware of her coverture.

An undertaking for a bail-bond given to the sheriff by the Defendant's attorney, being a mere nullity, an application by Defendant to set it aside and enter a common appearance, was discharged with costs, though Defendant was a feme covert.

Wilde Serjt., who shewed cause, admitted the Plaintiff's knowledge of the coverture, but alleged that the Defendant had been divorced *à mensâ et thorb* for adultery, and contended that the undertaking, being a nullity, — *Fuller v. Prest* (a), *Sedgworth v. Spicer* (b), — this application must be discharged with costs.

(a) 7 T. R. 102.

(b) 4 East, 568.

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Merewether. The object of the application is the stay of proceedings, actual and possible, against the Defendant on her entering a common appearance; a protection to which her coverture fully entitles her.

Sed per Curiam. The Defendant is not in custody. The undertaking is a mere nullity, and the application must be

Discharged with costs.

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HOWELL v. POWLETT.

When the Plaintiff gives notice of trial a term earlier than the rules of court require, if he omits to try pursuant to his notice, the Defendant may move for judgment as in case of a nonsuit, the next term.

ISSUE was joined in the above cause last term, but so late in the term that the Plaintiff was not obliged, according to the practice of the Court, to give notice of trial.

The Plaintiff, however, having given notice of trial, and having omitted to proceed to trial pursuant to notice,

Andrews Serjt. obtained a rule *nisi* for judgment as in case of a nonsuit, which

Wilde Serjt. opposed, on the ground that, according to the statute (14 G. 2. c. 17. s. 1.) judgment as in case of a nonsuit, can only be given where, after issue joined, the Plaintiff neglects "to bring such issue to trial according to the course and practice of the Court." Here issue was joined in *Michaelmas* term too late for the Plaintiff to give notice of trial according to the practice of the Court; he could not have obtained judgment of that term; and the notice actually given being a mere irregularity, the Defendant could not move for judgment

as in case of a nonsuit till *Easter* term. *Dacosta v. Ledstone* (a) shews that judgment as in case of a nonsuit can only be moved for in the term next after issue joined, when there is time for a trial in the term in which issue is joined.

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TINDAL C. J. The general understanding has been, that whenever a party has given notice of trial, he is bound to proceed pursuant to his notice, and that if he fails to do so the Defendant is entitled to move for judgment as in case of a nonsuit. If the Plaintiff has chosen here to expedite the proceedings a step, he cannot afterwards recede, and the Defendant is entitled to his rule.

PARK J. concurred.

BOSANQUET J. The Plaintiff is allowed till a certain time before he can be called on to give notice of trial; but if he chooses to give notice before that time, and fails to observe that notice, he is guilty of a default, and must take the consequence.

ALDERSON J. The statute contemplates a default wherever notice of trial has been given and not observed. The "course and practice of the Court" applies to the period at which the Plaintiff *can* go to trial, and he *can* go to trial after issue joined and notice given, although he might not have been compellable to give notice at the period in question.

Wildc now consented to give a peremptory undertaking, and upon that, the rule was

Discharged.

(a) 2 *H. Bl.* 558. and 2 *Archbd. C. P.* 151.

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ABRAHAM v. NEWTON.

Quere, Whether pregnancy and imminent delivery be a cause for the examination of a witness by the prothonotary, under 1 W. 4. c. 22.

If so, it must be shewn by affidavits of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause.

WILDE Serjt. had obtained a rule *nisi* for the examination of a female witness by the prothonotary, under 1 W. 4. c. 22. s. 1. (a), on an affidavit that she was pregnant, expected shortly to be delivered, and would be unable to attend the trial of the cause in the months of *February* and *March*. The affidavit, however, not disclosing the precise time at which she expected to be delivered,

Bompas Serjt., who shewed cause, objected to it as insufficient.

(a) By which, after reciting the powers given by 13 G. 3. c. 63. for the examination of witnesses in *India*, it is enacted, "That all and every the powers, authorities, provisions, and matters contained in the said recited act, relating to the examination of witnesses in *India*, shall be, and the same are hereby extended to all colonies, islands, plantations, and places under the dominion of his Majesty in foreign parts, and to the Judges in the several courts therein, and to all actions depending in any of his Majesty's courts of law at *Westminster*, in what place or county soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the Judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ of commission issued in pursuance of the authority hereby given,

will be necessary or conducive to the administration of justice in the matter wherein such writ shall be applied for." And by the tenth section it is enacted, "That no examination or deposition to be taken by virtue of this act, shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions."

The

The Court, without laying down any general rule, but expressing some doubt whether this was a case contemplated by the late act, thought that at all events the affidavit was insufficient. It ought to have been deposed by competent persons, that there was a fair ground for believing that the delivery would take place before the time of trial, or so near as to render the attendance of the witness perilous.

Rule discharged.

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REYNALDS.

Jan. 23.

Same v. BASTIAN.

DEBT for tolls due, and of right payable to Plaintiff for and in respect of goods landed by Defendant from ships upon Plaintiffs' quay: — in respect of goods landed by Defendant from certain ships: — and in respect of goods of Defendant imported into and exported from and out of a certain port or harbour: — for tolls generally; and for crantage and wharfage.

Plea, *nil debet*.

At the trial before *Alderson J.*, last *Bodmin* assizes, the Plaintiffs produced the following charter of the date of *Stephen* or *Henry II.*: —

“*Reginald Fitzroy*, Earl of *Cornwall*:—To all the barons of *Cornwall*, and all knights and all free tenants, and all men, as well *English* as *Cornish*, greeting. Know ye, that I have granted to my free burgesses of *Triverieu* all free

The corporation of *T.* having proved a prescriptive right to tolls. Held, that it was not destroyed by a charter of *Elizabeth*, granting and confirming, among other things, all the ancient rights of the corporation, but exempting the inhabitants from toll in all places except *London*:

Held, that this exemption applied to the tolls of all other places (except *London*), but not to the tolls of *T.*

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and municipal customs, and the same in all things which they had in the time of *Richard de Lacy*, to wit, sac and soc and thol and theam and infangenethef. And I have granted to them that they do not plead in hundred courts nor county courts, nor for any summons go to plead elsewhere without the town of *Triverieu*; and that they be quit of giving toll throughout all *Cornwall* in fairs and markets, and wheresoever they buy and sell. And that of their money lent and not restored they take distress in their town of their debtors."

Ancient books of the corporation were then produced, shewing various demises of the quay dues by the corporation from 1637 to 1692, (in 1672 they were described as ancient dues,) and from 1703 to 1713; — lists of biddings for the same dues; — surveys at various intervals from 1730 to 1800; — payment of poor-rate in respect of the dues in 1702 and 1703; — and receipts given by various collectors for dues at various times anterior to living memory.

Numerous witnesses proved the actual receipt of the dues by the Plaintiffs or their lessees from various inhabitants of the borough of *Truro* as well as strangers, from the year 1790 to the present time, and various acts of ownership on the quay. About four fifths of the entire dues were received from inhabitants.

The sums sought to be recovered of the Defendants were 1*d.* for every sack of flour landed at the quay.

The Defendants, as inhabitants of the borough of *Truro*, claimed exemption from these dues under a charter of 31 *Eliz.*, which, — after reciting that the borough of *Truro* was an ancient borough; that the port of *Falmouth* was in decay and wanted speedy repair, because from the constant employment of the tinner there a great quantity of rubbish had accumulated in the port, to the great injury of the port; that the borough of *Truro* was so injured thereby, that whereas formerly ships

ships of 100 tons used to come laden into the port, now scarcely ships of thirty tons could enter; that the inhabitants of *Truro* had endeavoured by all means to preserve the port, as well as by constant cleansing and repairs, in order that ships coming thither might pursue their ancient course (*ad Clavem, Anglice*) to the *keye*; and that the inhabitants of the said borough enjoyed many franchises, liberties, privileges, customs, usages, and immunities, as well by prescription as by divers charters, grants, and confirmations, as well of *Reginald*, formerly Earl of *Cornwall*, as of divers kings of *England*; — granted to the inhabitants to be incorporated by the name of the “Mayor and Burgesses of the Borough of *Truro*,” and that they by the name of the mayor and burgesses, &c. might and should be for ever capable by law to have, &c. lands, tenements, liberties, privileges, jurisdictions, franchises, &c. to them and their successors in fee; and also goods, &c., and that they and their successors by the mayor and council, &c. should make bye-laws, &c. It then granted and confirmed to the said mayor and burgesses, and their successors, all messuages, lands, tenements, customs, privileges, immunities, advantages, &c. within the said borough, which the said mayor and burgesses, or the inhabitants, by whatever names or name corporate or incorporate, by reason or colour of any prescription, &c. for fifty years past had held: and that the burgesses and inhabitants of the said borough, and their successors from thenceforth for ever, should and might be free of tollnet, passage, pontage, murage, pannage, penage, anchorage, coynage, wharfage, cranage, keyage, stallage, lastage, feltage, and tollage, stonegeld, and scot of all their own proper things, goods, and merchandizes throughout the whole kingdom of *England*, except the city of *London*, and the suburbs and limits thereof. And that they might have fairs and markets within the borough, to be held and kept in pontage, keyage,

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keyage, portorage, weighage, lastage, anchorage, and culage, &c.

There was evidence also by which it appeared that the inhabitants had been excused from paying anchorage for empty vessels, and exempted from serving on juries. But the tariff by which the inhabitants were excused from anchorage recited their liability to quayage, and it appeared that they paid anchorage for ships laden with coals.

In the second cause the Defendants relied also on alleged variations in the amount of the tolls collected, particularly in the article of currants and molasses; but these variations consisted chiefly of clerical mistakes in the collector's accounts, and of an attempt made in 1815 by the collector and town steward, without the privity of the corporation, to assimilate the tariff of *Truro* to that of *Falmouth* and *Penzance*; which attempt was abandoned upon a remonstrance by the inhabitants of *Truro*. In a tariff fifty years old there were only four variations among 150 charges, and none of these variations affected the toll for flour.

It was objected also, on the part of the Defendants, that the Plaintiffs had not proved their title to sue as a corporate body by the style of the mayor and burgesses of *Truro*.

The learned Judge over-ruled this objection, and left it to the jury to find whether the Plaintiffs had shewn a prescriptive right to the tolls in question, or whether the existence of the charter of *Elizabeth*, although the charter could not of itself abrogate any former grant or prescription, was incompatible with the presumption of such a prescription.

The jury having found for the Plaintiffs,

Merewether Serjt., in *Michaelmas* term, moved for a new trial, on the ground that the Plaintiffs had given no evidence of their title to sue as the mayor and burgesses

gesses of *Truro*; that the Defendants were exempted from toll by the charter of *Elizabeth*, the acceptance of which implied a surrender of all former charters and rights, prescriptive or otherwise; and that the variations in the amount of the toll were fatal to the claim by prescription.

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The Court thought the Plaintiffs had adduced sufficient *prima facie* evidence of their right to sue in a corporate capacity, and therefore refused a rule on the first ground, but granted it on the two others.

Wilde Serjt. shewed cause. The variations in the amount of toll have been satisfactorily explained at the trial, and are too recent to affect the validity of this prescription. The clause relied on by the Defendants in the charter of *Elizabeth*, exempts the inhabitants of *Truro* from dues in other towns except *London*, but does not exempt them from dues necessary for the support of *Truro*, and received by the corporation long before the charter. The construction contended for by the Defendants would render the grants to the corporation nugatory, — for four fifths of the tolls are paid by inhabitants, — and leave the town without walls or bridges; for the same clause which exempts the inhabitants from tolls exempts them also from murage and pontage. The meaning of the clause, therefore, is clear; but if it were doubtful, the true exposition has been put upon it by contemporary and continued usage, which in cases of doubt has been holden to be the safest guide. *Attorney-General v. Parker* (a), *Blankley v. Winstanley* (b), *Withnell v. Gartham* (c), *Chad v. Tilsed* (d), *Lowden v. Hierons* (e), *Rex v. West Looe* (g), *Rex v. Grout* (h),

(a) 3 *Ask.* 577.

(b) 3 *T. R.* 279.

(c) 6 *T. R.* 396.

(d) 2 *B. & B.* 403.

(e) 2 *B. Moore*, 102.

(g) 3 *B. & C.* 677.

(h) 1 *B. & Adol.* 103.

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Norton v. Hammond (a), *Corporation of Stamford v. Pawlett*. (b) Besides which, all claims of exemption are to be construed strictly. 2 Roll. Abr. 202. tit. *Prerogative le Roy*. Z.

Merewether. The construction contended for by the Defendants will not render the grants to the corporation nugatory, for they may have other property wherewith to support the quay, walls, and bridges; or they may be entitled to levy these tolls of the inhabitants on fair and market days, to which the grant in the charter is confined, without having a right to levy them at all times. *Warrington v. Mosely*. (c) But the charter of *Elizabeth* having specified *London* as the only place in which the inhabitants of *Truro* shall be liable to toll, has by that specification impliedly exempted them in all other places, including *Truro* itself. The language of the charter is unambiguous; the acceptance of it by the corporation is an implied surrender of all former corporate rights; and the grantees under that charter are estopped to claim upon any previous right. The usage relied on is ambiguous, and altogether subsequent to the charter of *Elizabeth*.

TINDAL C. J. There is no necessity, nor would there be any justice in submitting this case to a second jury.

The question is, Whether the Plaintiffs have established a prescriptive right to a toll of 1d. a sack for certain goods landed on the quay at *Truro*? The Plaintiffs rest their claim on prescriptive usage. To see whether they have supported it, let us take, first, the evidence which is independent of the charter of *Elizabeth*. For the last forty or fifty years it appears that 1d. has been paid for every sack of flour landed on the quay by inhabitants of *Truro* as well as strangers.

(a) 1 Young & Jar. 94.

(b) 1 Cromp. & Jar. 57.

(c) 4 Mod. 319.

Then,

Then, we have evidence of receipts of various sums by collectors, for quayage, long antecedent to the time of living witnesses. Further back we find various biddings for the ancient quay duties of *Truro*: and then leases of these duties from 1637 to the early part of the last century. Now if this had been the whole evidence adduced, who could doubt that it would sufficiently establish a prescriptive usage?

If we were to hold otherwise, we should hold that the security of rights was impaired instead of being confirmed by long-continued usage.

Then comes the charter of *Elizabeth*. It may be admitted that if there were an express renunciation on the face of the charter of all antecedent privileges, the parties must take the benefit of the charter with the disadvantage so attached to it: but neither by express renunciation nor by necessary implication can we collect from this charter that there was to be any alteration in the duties of the quay. Even if there were a doubt, the receipt of rent for the dues up to 1637 would remove it, for contemporary usage is of great weight in the exposition of such instruments; and no one can suppose that the lessees of those times would burthen themselves with the payment of a rent for tolls if the charter were adverse to the claim of the corporation. But looking to the charter itself, we see no reason for doubt. The charter begins by calling *Truro* an ancient borough: that, of itself, may imply a borough by prescription. It then goes on to confirm all advantages which the burgesses had had by reason of any prescription for fifty years last past; and then comes the clause relied on for the Defendants, — “The burgesses and inhabitants of the said borough, and their successors from henceforth for ever hereafter, shall and may be free of tollnet, passage, pontage, murage, pannage, penage, anchorage, coynage, wharfage, cranage, keyage,

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keyage, stallage, lastage, feltage, and tollage, stonegeld, and scot of all their own proper things, goods, and merchandizes, throughout our whole kingdom of *England*, except the city of *London*." It has been contended that this constitutes an exemption of the inhabitants from all duties within the borough,

The natural impression on first reading the passage is, that the sovereign who grants is about to grant the inhabitants an exemption from some duties to which they were liable antecedently to the charter. But upon looking at the words accurately, it is plain they cannot relate to duties within the borough of *Truro*. "Shall be free of tollnet, *passage*," — that must mean passage over the lands of others, for it is not probable they should have paid toll for passing over their own lands.

Take "*pontage*;" that is a duty levied for repairing bridges. It would be reasonable to exempt them from repairs of bridges at *Exeter* or *Bristol*; but if they were not to repair at *Truro*, who should?

Take "*murage*;" that, it is well known, was a duty for the repairs of the town walls, and necessarily cast on the inhabitants; so that if they are exempted under this grant, it would follow that the Queen meant them to be without walls. If we find in the sentence, these words, which cannot apply to exemptions in the town of *Truro*, why are we to hold anchorage, wharfage, and quayage, to mean the anchorage, wharfage, and quayage of that town?

Then follows, "and shall have fairs and markets within the borough, to be held and kept in pontage, quayage, weighage, lastage, &c.;" and it is contended that this implies a negative of a larger prescriptive right for all periods of the year. But if the general right be once established, the introduction of words merely affirmative will not rescind it. I have never
heard

heard that if an existing right be shewn, it can be taken away by mere words of addition. It is true one cannot always explain why such words have been added. It may be *pro majori cautela*; but they have no effect to cut down an antecedent right.

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An argument has been raised on the word *anchorage*, and it is urged that it appears from a tariff of duties that anchorage has not always been taken from the inhabitants. But it appears the inhabitants do pay on all ships laden with coals; and the amount of the exemption is, that in some instances they do not pay for empty vessels.

The utmost effect of this is, that as the grantees of duties may relinquish the demand where they find it burthensome, by common consent it seems to have been agreed, that duties for empty vessels shall not be demanded.

This disposes of the first case. It would be of no use to send the cause down again if the second trial would be attended with no different result, particularly when it has been left to the jury to find, and they have found a prescription antecedent to the charter.

The second case is the same, with the exception that a variance was alleged in the toll for a cask of currants and a cask of molasses. But the question on that variance was left to the jury, whether it arose from mistake or accident, or they were satisfied it was such as defeated the prescriptive right. And as it was so left to them, it would be of no use to try the question a second time.

PARK J. I am of the same opinion, and never heard so clear a case. First, as to usage. We have it in a strong and uniform course from 1637 to 1829; and the earlier documents carry in themselves traces of usage long before. But if in modern times we find the usage
 uniform

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uniform for a considerable period, we are bound rather to support such usage than to defeat it upon any immaterial variance. And nothing can be more reasonable than this custom, that the corporation, which is at the expense of keeping up the quay and adjoining streets, should raise toll to defray the necessary expense.

It is said, indeed, that the corporation may possess other funds; but of that there is no evidence whatever. We are called upon, however, to suppose that the charter of *Elizabeth* is the beginning of this custom to levy toll, and it is true, that there is no evidence of any payment before 1637. But the evidence is uniform to 1674; a document of 1672 speaks of the dues as "ancient dues;" it can scarcely be believed that the word *ancient* would be applied to a custom of less than forty years' standing; and the charter itself speaks of the ancient course to the quay.

The exemption proved in respect of certain dues for anchorage has been sufficiently accounted for by the Chief Justice, and it may have originated in the circumstance, that the harbour at that place required no further repairs.

I agree in the correctness of the construction put by the Chief Justice on the general clause of exemption in the charter. It would be absurd to suppose the inhabitants exempted from duties which must have been granted to the corporation to enable them to keep up the necessary repairs of the town. They are exempted from the murage and pontage of other places, but must be liable to their own. The special exception of *London* from the general clause of exemption, arose either from the pre-eminence of the capital, or for the sake of greater caution; but it leads to no inference that the inhabitants were to be exempted from the necessary charges of their own town.

BOSANQUET

BOSANQUET J. The rule must be discharged. Two matters have been proposed for our consideration; first, the existence of a prescriptive usage; secondly, the effect of the charter of *Elizabeth*. The first, a matter of fact; the second, a question of law for the Court. Now, upon the first it was left to the jury pointedly to say whether this usage existed before the date of the charter. And on that subject the evidence is exceedingly strong.

It appears that these dues have been received for near 200 years; and in an early part of that period they are described as ancient dues. The only question on a new trial would be, whether the jury were clearly wrong in their finding on this point. It seems to me they were clearly right.

In the second case, indeed, there appears a trifling variation in some of the payments; but the nature and cause of that variation was left to the jury, and by them properly disposed of.

It appears that the dues in respect of anchorage were not levied on light vessels; but a consent that they should not be collected in such cases, rather confirms than impugns the general right to dues in the other cases.

Secondly, as to the construction of the charter of *Elizabeth*: If the exemption from quayage were unequivocal, and the corporation had accepted the charter subject to such exemption, they would, no doubt, be bound by it; but one question is, whether the language of the charter is so unequivocal as to countervail the prescriptive usage found by the jury; for if it be only equivocal, it must be explained by the usage. Now, the construction contended for is most unreasonable, namely, that the corporation of *Truro* is to levy a duty on all the rest of the kingdom for the support of their quay, and not on the inhabitants of the town of *Truro*. The exemption, it will be observed, is in the nature of a grant.

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The reasonable construction, therefore, is, that it means an exemption from duties elsewhere, which the sovereign might, without inconsistency, remit. It would be most unreasonable to suppose an exemption from the duties granted by a clause in the same charter containing no exception. Stress has been laid on the clause respecting duties in fairs and markets. I shall not repeat the observations of the Chief Justice; but if the right in question, as the jury have found, was vested in the corporation before the charter, the affirmative language of the charter will not deprive them of the antecedent right.

ALDERSON J. I concur in the decision which has been pronounced. I thought the case clear at the trial, and I have seen no reason to alter my opinion.

It was a question for the jury to say, whether the corporation had any prescriptive right to these dues. The evidence began with modern usage, and in the first cause it was proved that there had been no variations as far as human memory went. Then followed much documentary evidence, to shew that the quayage had been let and taken from 1637 to the present time.

I left it to the jury to consider whether it was not reasonable to infer that the duty had been taken as far back as 1637; and whether from that circumstance they would not infer a legal origin of the custom. If such evidence be not sufficient to warrant such an inference, I do not know what title would stand the test of legal enquiry.

And the charter of *Elizabeth* does not in any way break in upon this title.

I shall not add to what has fallen from the Chief Justice on that subject. But as to the argument drawn from the grant of duties during fairs and markets, such a grant in its nature only enables the corporation to levy from the strangers who frequent the fairs and
 markets

markets during their temporary sojourn, whereas my brother *Merewether* who relied on the argument, contends that strangers are to be liable at all times. I think, therefore, the jury have found a right verdict.

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The second case turned on the question whether there had been any variation in the usage in modern times. The evidence of that was, an unsatisfactory witness whose credit was left to the jury; a tariff fifty years old, containing only four variations in 150 charges, (not one of which variations applied to the charge now in issue,) and papers which at various times had been given by the collectors to inhabitants of the town, in some of which the variation was a mere mistake on the face of the paper.

If no corporation could maintain its tolls without producing a series of bills exempt from mistake, it is probable that no tolls would long exist.

But in 1815 it appeared there had been an attempt to establish a new tariff, accompanied with some improper conduct by a collector, without the privity of the corporation. That new tariff was presented to the people of *Truro*, they had a meeting; refused to pay; and in a conference with the corporation, produced the old tariff, when they settled from that the rates which have been demanded ever since. That was of itself strong evidence in favour of the ancient toll, and put an end to the objection on the ground of variance. The whole, however, was left to the jury, and I told them if they were of opinion the corporation had established a right to the ancient amount of toll, a slight variation in modern times would not destroy it. I was satisfied with the verdict, and think this rule should be

Discharged.

REGULÆ GENERALES.

Hilary Term, 2 W. 4.

I.

WHEREAS it is expedient that the practice of the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, should, as far as possible, be rendered uniform: IT IS ORDERED, That the practice to be observed in the said Courts, with respect to the matters hereinafter mentioned, shall be as follows; that is to say, —

AUTHORITY TO PROSECUTE OR DEFEND.

1. Warrants of attorney to prosecute or defend, shall not be entered on distinct rolls, but on the top of the issue roll. - - - - -

2. A special admission of prochein amy or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified. -

AFFIDAVIT.

3. No affidavit of the service of process shall be deemed sufficient if made before the plaintiff's own attorney, or his clerk. - - - - -

4. An affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such Judge belongs, though not entitled of that Court; but not in any other Court, unless entitled of the Court in which it is to be used. - - - -

(a) The references to *Tidd's Practice* have been added for the convenience of the profes-

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5. The addition of every person making an affidavit shall be inserted therein. - - - -	499	493
6. Where an agent in town, or an attorney in the country is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail. - - - -	500	494

ARREST.

7. After <i>non pros</i> , nonsuit or discontinuance, the defendant shall not be arrested a second time without the order of a Judge. - - - -	174	175
8. Affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant. -	183, 4	184
9. No supplemental affidavit shall be allowed to supply any deficiency in the affidavit to hold to bail.	191	189
10. A variance between the <i>ac etiam</i> and the declaration, or the want of an <i>ac etiam</i> , where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail bond or recognizance of bail shall be taken with a penalty or sum of forty pounds only. - -	{ 453 293 }	{ 450 294 }

WRIT, WHEN AND HOW TO BE FILED.

11. When the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration	U 3
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piration of the rule, or as soon after as the office shall be open. - - - - -		308	307
12. And the officer with whom it is filed shall endorse the day and hour when it was filed. -		309	308
BAIL.			
13. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time. - - - - -		247	247-8
14. In the case of country bail, the bail piece shall be transmitted and filed within eight days, unless the defendant reside more than forty miles from <i>London</i> , and in that case, within fifteen days after the taking thereof. - - - -		252	252
15. When bail to the sheriff become bail to the action, the plaintiff may except to them though he has taken an assignment of the bail bond. -		255	255
16. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification. - - - -		259	260
17. If bail, either to the action or in error are excepted to in vacation, and the notice of exception require them to justify before a Judge, the bail shall justify within four days from the time of such notice, otherwise on the first day of the ensuing term. -		260	260
18. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge. -		268	266
19. Affidavits of justification shall be deemed insufficient,			

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sufficient, unless they state that each person justifying is worth the amount required by the practice of the Courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail.	- - - - -	268	267
20. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.	- - - - -	277	275
21. Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognizance.	- - - - -	{ 282 385	280
22. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.	- - - - -	286	284
23. A plaintiff shall not be at liberty to proceed on the bail bond pending a rule to bring in the body of the defendant.	- - - - -	297	297
24. No bail bond taken in <i>London</i> or <i>Middlesex</i> shall be put in suit, until after the expiration of four days; nor, if taken elsewhere, till after the expiration of eight days exclusive, from the appearance day of the process.	- - - - -	299	299
25. The time allowed for excepting to bail put in upon a <i>habeas corpus</i> shall be twenty days.	-	409	409
26. A recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs.	- -	1211	1156
27. In ejectment, the recognizance of bail in error shall be taken in double the yearly value and double the costs.	- - - - -	1212	1252

BAIL BOND AND ACTION THEREON.

28. An action may be brought upon a bail bond by the sheriff himself in any Court. - - 300 300

29. In all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. - - 305 304-5

30. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more. - - 587 542

APPEARANCE.

31. A defendant who has been served with process by original, shall enter an appearance within four days of the appearance day, if the action is brought in *London* or *Middlesex*, or within eight days of the appearance day in other cases, otherwise the plaintiff may enter an appearance for him according to the statute ; and any attorney who undertakes to appear, shall enter an appearance accordingly. - - 241 240

IRREGULARITY IN PROCESS AND PROCEEDINGS.

32. Where the defendant is described in the process or affidavit to hold to bail by initials or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. - - - - 146 148

33. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has

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has taken a fresh step after knowledge of the irregularity. - - - - -	562	513
34. If a party plead several pleas, avowries, or cognizances without a rule for that purpose, the opposite party shall be at liberty to sign judgment. -	613	567
DECLARATION AND TIME FOR.		
35. A plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable. - - - - -	299	299
36. When the plaintiff declares against a prisoner, it shall not be necessary to make more than two copies of the declaration, of which one shall be served and another filed with an affidavit of service; upon the office copy of which affidavit a rule to plead may be given. - - - - -	{ 346 358 }	{ 344 455 }
37. Where a cause has been removed from an inferior court, the rule to declare may be given within four days after the end of the term in which the writ is returned. - - - - -	419	417-18
38. It shall not be necessary for a defendant in any case to give a rule to declare, except upon removal from inferior Courts; but the plaintiff may have a rule for time to declare in the Court of Exchequer as well as in the other Courts. - -	423	422
39. A rule to declare peremptorily may be absolute in the first instance. - - - - -	426	424
40. A declaration laying the venue in a different county from that mentioned in the process shall not be deemed a waiver of the bail. - - - -	434	432
41. It shall not be deemed necessary to express the amount of damages in a notice of declaration. -	461	457
42. Where		

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42. Where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term.	{ 481 475 }	{ 475 409 }

PLEA AND TIME FOR.

43. A demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon.	482	476
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44. If a defendant after craving <i>oyer</i> of a deed omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer book may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer.	638	589
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45. If the declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea.	{ 691 468 }	{ 639 463 }
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46. The defendant shall not be at liberty to waive his plea without leave of the Court or a Judge.	727	674
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PARTICULARS.

47. A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the Judge think fit, without the production of any affidavit.	{ 642 643 }	596
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48. A defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till		
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till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the Judge.	643	598

NOTICES AND RULES AND SERVICE THEREOF.

49. Where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the Court.	461	457
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50. Service of rules and orders, and notices, if made before nine at night, shall be deemed good, but not if made after that hour.	505	499
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51. It shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment.	506	500
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52. Where a term's notice of trial, or inquiry is required, such notice may be given at any time before the first day of term.	685	577
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53. A rule to reply may be given at any time when the office is open.	729	676
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54. Service of a rule to reply, or plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading.	730	676
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PAYMENT OF MONEY INTO COURT.

55. In all cases in which money may be paid into Court, leave to pay it in may be obtained by a side bar rule.	672	621
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56. On payment of money into court, the defendant shall undertake by the rule to pay the costs, and in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages.	677	626
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TRIAL

TRIAL AND NOTICE THEREOF.

57. Notice of trial and inquiry, and of continuance of inquiry, shall be given in town, but countermand of notice of trial, or inquiry, may be given either in town or country, unless otherwise ordered by the Court, or a Judge. - - - - -

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813 753

58. The expression "short notice of trial" shall, in country causes, be taken to mean four days. -

478 472

59. In all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial at the time of delivering his replication, or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid; and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c. to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer. - - - - -

626 578

60. Notice of a trial at bar shall be given to the proper officer of the Court, before giving notice of trial to the party. - - - - -

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61. In

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61. In country causes, or where the defendant resides more than forty miles from town, a countermand of notice of trial shall be given six days before the time mentioned in the notice for trial, unless short notice of trial has been given. - -	817	757
62. In town causes where the defendant lives within forty miles of town, two days' notice of countermand shall be deemed sufficient. - -	817	757
63. The rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, without affidavit, or motion for that purpose. - - - - -	848	797

NEW TRIAL, MOTION IN ARREST OF JUDGMENT.

64. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. - - - - -	947	916
65. No motion in arrest of judgment, or for judgment <i>non obstante veredicto</i> , shall be allowed after the expiration of four days from the time of trial, if there are so many days in term, nor in any case after the expiration of the term, provided the jury process be returnable in the same term. - - -	960	928

JUDGMENT AND TIME FOR SIGNING.

66. Judgment for want of a plea after demand may in all cases be signed at the opening of the office in the afternoon of the day after that on which the demand was made, but not before. - -	481	477
67. After the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and after a verdict, or nonsuit, on the day		

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day after the appearance-day of the return of the <i>distringas</i> , or <i>habeas corpora</i> , without any rule for judgment. - - - - -	{ 690 984	{ 581 903 }

JUDGMENT AS IN CASE OF NONSUIT.

68. A rule *nisi* for judgment as in case of a nonsuit may be obtained on motion without previous notice, but in that case it shall not operate as a stay of proceedings. - - - - 495 491

69. No motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, but such costs may be moved for separately, (*i. e.*) without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the Court on discharging a rule for judgment as in case of a nonsuit may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule. - 819 759

70. No entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso. - - - - 821 761

71. No trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary. - - - - 821 761

WARRANT OF ATTORNEY AND COGNOVIT.

72. No warrant of attorney to confess judgment, or *cognovit actionem*, given by any person in custody of a sheriff, or other officer upon mesne process shall be of any force, unless there be present some attorney
on

on behalf of such person in custody expressly named by him, and attending at his request to inform him of the nature and effect of such warrant or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney. - - - - -

{ 595 549 }
597 607 }
607 560 }

73. Leave to enter up judgment on a warrant of attorney, above one and under ten years old, must be obtained by a motion in term, or by order of a Judge in vacation; and if ten years old or more, upon a rule to shew cause. - - -

600 533

COSTS.

74. No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. - - - - -

1011 975

EXECUTION.

75. It shall not be necessary that any writ of execution should be signed; but no such writ shall be sealed till the judgment-paper, postea, or inquisition, has been seen by the proper officer. - - -

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1067 1027 }

76. A writ of *habere facias possessionem* may be sued out without lodging a *præcipe* with the officer of the Court. - - - - -

1080 1244

77. In actions commenced by bill a *ca. sa.* to fix bail shall have eight days between the teste and return, and in actions commenced by original fifteen, and must in *London* and *Middlesex* be entered four clear days in the public book at the sheriff's office. -

1148 1098

SCIRE FACIAS.

78. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs. - - 982 947

79. A *scire facias* to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a Judge's order in vacation, nor if more than fifteen without a rule to shew cause. - - - - 1157 1105

80. A *scire facias* upon a recognizance taken in Serjeant's Inn, or before a commissioner in the country, and recorded at *Westminster*, shall be brought in *Middlesex* only, and the form of the recognisance shall not express where it was taken. - 1175 1122

81. No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*. - - 1178 1125

82. A notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail, or defendant on a *scire facias*. - - - 1180 1127

ERROR.

83. A writ of error shall be deemed a *supersedeas* from the time of the allowance. - - - 574 530

84. To entitle bail to a stay of proceedings pending a writ of error the application must be made before the time to surrender is out. - - - 577 532

SUPERSEDEAS.

85. The plaintiff shall proceed to trial, or final judgment against a prisoner within three terms inclusive

clusive after declaration, and shall cause the defend-
ant to be charged in execution within two terms
inclusive after such trial or judgment; of which the
term in, or after which the trial was had shall be
reckoned one. - - - - - 366 362

86. The marshal of the King's Bench prison, and
the warden of the Fleet, shall present to the Judges
of the Courts of King's Bench, Common Pleas, and
Exchequer, in their respective chambers at *West-*
minster, within the first four days of every term, a list
of all such prisoners as are supersedeable; shewing
as to what actions and on what account they are so,
and as to what actions (if any) they still remain not
supersedeable. - - - - - 371 36

87. If by reason of any writ of error, special order
of the Court, agreement of parties, or other special
matter, any person detained in the actual custody of
the marshal of the King's Bench prison or warden of
the Fleet, be not entitled to a supersedeas or dis-
charge to which such prisoner would, according to
the general rules and practice of the Court, be other-
wise entitled, for want of declaring, proceeding to
trial or judgment, or charging in execution, within
the times prescribed by such general rules and
practice, then and in every such case the plaintiff or
plaintiffs at whose suit such prisoner shall be so
detained in custody, shall, with all convenient speed,
give notice in writing of such writ of error, special
order, agreement, or other special matter, to the
marshal or warden, upon pain of losing the right to
detain such prisoner in custody by reason of such
special matter; and the marshal or warden shall
forthwith after the receipt of such notice cause the

matter thereof to be entered in the books of the prison, and shall also present to the Judges of the respective Courts from time to time a list of the prisoners to whom such special matter shall relate, shewing such special matter together with the list of the prisoners supersedeable.

372-2	667
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88. All prisoners who have been or shall be in the custody of the marshal or warden for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet prison as to all such actions in which they have been or shall be supersedeable.

372	367
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89. The order of a Judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial, or final judgment, or execution in due time, may be obtained at the return of one summons served two days before it is returnable, such order in town causes being absolute, and in country causes, unless cause shall be shewn within four days, or within such further time as the Judge shall direct.

372	369
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90. A rule or order for the discharge of a debtor who has been detained in execution a year for a debt under twenty pounds, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.

393	388
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ATTORNEY AND HIS BILL.

91. An order to deliver or tax an attorney's bill may be made at the return of one summons, the

same

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same having been served two days before it is return-
able.

336 335-6

92. One appointment only shall be deemed neces-
sary for proceeding in the taxation of costs, or of an
attorney's bill.

336-7 336

93. No set-off of damages or costs between parties
shall be allowed to the prejudice of the attorney's lien
for costs in the particular suit against which the set-off
is sought, provided, nevertheless, that interlocutory
costs in the same suit, awarded to the adverse party,
may be deducted.

{ 340 339 }
{ 784 880 }

MISCELLANEOUS.

94. It shall not be necessary that a *pluries capias*
be stamped by the clerk of the warrants to authorize
the exigenter to make out an exigent.

129 132

95. In order to charge a defendant in execution,
it shall not be necessary that the proceedings be
entered of record

{ 367 363 }
{ 369 365 }

96. Side bar rules may be obtained on the last as
well as on other days in term.

303 498

97. A rule may be enlarged, if the Court think fit,
without notice.

509 502

98. An application to compel the plaintiff to give
security for costs must in ordinary cases be made
before issue joined.

582 537

99. Leave to compound a penal action shall not be
given in cases where part of the penalty goes to the
crown, unless notice shall have been given to the
proper officer, but in other cases it may.

604 557

100. Where the defendant, after having pleaded,
is allowed to confess the action, he may withdraw his

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plea in person without the appearance of the attorney or his clerk for that purpose before the officer of the Court. - - - - -	607	560
101. There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a Judge upon summons for that purpose. - - - -	623	576
102. An order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance upon an affidavit that the copyhold tenant has applied for and been refused inspection.	648	594
103. In cases where the application for a rule to change the <i>venue</i> is made upon the usual affidavit only, the rule shall be absolute in the first instance; and the <i>venue</i> shall not be brought back except upon an undertaking of the plaintiff, to give material evidence in the county in which the <i>venue</i> was originally laid. - - - - -	658	608
104. Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into Court. - -	666	616
105. After judgment by default, the entry of any subsequent continuances shall not be required. -	732	678
106. To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, defendant shall be at liberty to sign a <i>non pros</i> . - - - -	734	680
107. It		

		Tidd's Practice.	
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		page	page
107. It shall not be necessary that any pleadings which conclude to the country be signed by counsel.		738	693
108. In all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to rejoin. - - -		774	718
109. It shall not be necessary that imparlances should be entered on any distinct roll. - -		777	720
110. Where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs though he has not been dispaupered. -		819	759

II.

AND IT IS FURTHER ORDERED, That upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service and attendance to receive debt and costs, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed: and if more than one sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation.

The indorsement shall be written or printed in the following form: —

“ The plaintiff claims — for debt, and —
for costs. And if the amount thereof be paid
to the plaintiff or his attorney within four
days

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days from the service hereof, further proceedings will be stayed."

III.

AND IT IS FURTHER ORDERED, That in *Hilary* and *Trinity* terms, a plaintiff in any country clause may file or deliver a declaration *de bene esse*, within four days after the end of the term, as of such term.

IV.

AND IT IS FURTHER ORDERED, That the rules heretofore made in the Court of King's Bench and Common Pleas respectively, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, shall be extended and applied to the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all personal and mixed actions; and that in none of such actions shall the original writ be repeated in the declaration, but only the nature of the action stated, in manner following: viz. *A. B.* was attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment, or as the case may be, and any further statement shall not be allowed in costs.

V.

AND IT IS FURTHER ORDERED, That upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, in a town cause in the term next after that in which the writ is
return-

returnable, and in a country cause at the ensuing assizes.

VI.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the copy of any judgment, writ, or other public document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing, and production of such copy, to admit such copy, and unless such adverse party shall have refused or neglected to make such admission.

VII.

AND IT IS FURTHER ORDERED, That the expense of a witness called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness,) have neglected or refused to admit such handwriting or execution, or unless the Judge, upon attendance before him, shall indorse upon such summons, that he does not think it reasonable to require such admission.

VIII.

AND IT IS FURTHER ORDERED, That in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a
Sunday,

REGULÆ GENERALES, HILARY TERM.

Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also.

AND IT IS FURTHER ORDERED, That the above Rules shall take effect on the first day of next *Easter* term.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
W. GARROW.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

1832.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Second Year of the Reign of WILLIAM IV.

WYATT v. HODSON.

April 17.

THIS was an action on a promissory note for 1000*l.*, which the Defendant, as a surety, had made jointly and severally with his brother in *November* 1824.

The statute of limitations having been pleaded, the Plaintiff proved payment of interest by the Defendant's brother up to 1828; whereupon a verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a nonsuit, on the ground that payment of interest by a joint contractor would not, as against the co-contractor, revive a debt barred by the statute.

Under 9 G. 4. c. 14. payment of interest within six years by one of several joint contractors takes a debt out of the statute of limitations as against all.

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v.

HODSON.

Jones Serjt. having obtained a rule *nisi* accordingly,

Wilde Serjt., who shewed cause, referred to 9 G. 4. c. 14. s. 1., which provides that nothing therein contained shall alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; and to *Whitcomb v. Whiting* (a), *Jackson v. Fairbank* (b), *Perham v. Raynal* (c), *Burleigh v. Stott* (d), *Pease v. Hirst* (e), and *Chippendall v. Martin* (g) to shew that payment of interest by one of several joint contractors is an acknowledgment of debt binding on the others; when the Court called on

Jones. (*Andrews* Serjt. was with him.) The decision in *Whitcomb v. Whiting*, on which the subsequent cases are founded, was disapproved of in *Atkins v. Tredgold* (h), and is incompatible with *Bland v. Haselrig*. (i) And the 9 G. 4. c. 14., which has enacted that even an actual promise to pay shall not revive a six years' debt, unless such promise be in writing, could never mean to give a greater effect to an implied promise. Now the payment of interest is only an acknowledgment from which a promise to pay may be implied; and though by an exception in the statute it is enacted, that payment of interest by any person whatsoever shall prevent the time of limitation from taking effect, yet that must be confined to the individual paying, or an executor or administrator; the word *whatsoever* being substituted for executor and administrator, which immediately before occur in the clause limiting the effect of a promise by one of many joint contractors. "No joint contractor, or executor or administrator of any contractor, shall lose the benefit of

(a) *Dougl.* 652.(b) 2 *H. B.* 340.(c) 2 *Bingb.* 306.(d) 8 *B. & C.* 36.(e) 10 *B. & C.* 122.(g) 4 *Carr. & P.* 98.(b) 2 *B. & C.* 23.(i) 2 *Ventr.* 151.

the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." From the provision, also, respecting judgment, it may be collected that the conclusive effect of payment of interest was to be confined to the individual paying, and to executors or administrators: — "Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, *or otherwise*, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

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The natural meaning to be put on the words *or otherwise*, is the payment of interest described in the proviso immediately preceding.

TINDAL C. J. It seems clear to us that the Defendant is not protected by the statute. The question turns on the construction of 9 G. 4. c. 14.; and in order to consider that rightly, we should see what the law was before that statute passed. Now, in *Burleigh v. Stott*, which was, like this, an action against the administrator of a surety on a joint and several promissory note, it was held, that a payment on account of the note within six years by the other joint contractor operated as a promise to pay the residue by all who were jointly liable.

The statute then provided for the case of promises by one of many joint contractors. After enacting that

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v.

HOBSON.

an oral promise shall not suffice to revive a demand barred by the statute of limitations, it proceeds: "And where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." That is a provision in favour of such as are not parties to the written promise. Then, with respect to payment of principal or interest, it provides, "that nothing herein contained shall alter, or take away, or lessen, the effect of any payment of any principal or interest made by any person *whatsoever*." Not confining the effect of payment to the individual paying. Why? Because the payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. The statute then proceeds to enact, "that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

It has been urged, that from the word *otherwise* we must imply "by payment of interest," and thence infer that

that payment of interest, like the written acknowledgment or promise with which it is coupled, is to operate only against the party paying. But there are various acts to which the word *otherwise* might apply; as payment into court, or indorsement by a party who had received interest. However, on the broad construction of the act, we think payment of money by one of several joint contractors an acknowledgment not within the mischief or the remedy provided by the legislature against the effect of an oral promise.

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PARK J. I have always considered *Whitcomb v. Whiting* a governing case, notwithstanding some observations which have been thrown out against it. But the case has been recognised in *Burleigh v. Stott*, and confirmed in *Perham v. Raynal*, where an acknowledgment by one of several joint contractors on a promissory note was held to be binding on the others.

That was, like the present, the case of a surety, and, therefore, expressly in point. Then, the recent statute having distinguished between the effect of a promise by one of many joint contractors and the payment of interest by such a person, the law, in respect of such a payment, remains as it was under the previous decisions.

GASELEE J. I am of the same opinion. The words "nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person *whatsoever*," coming after the enactment that a party should not be prejudiced by the promise of a joint contractor, is a convincing proof that a distinction was intended between the two cases.

ALDERSON J. When the act passed, the case of *Burleigh v. Stott* had decided that payment on account,

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v.

HODSON.

by one of many joint contractors should have the effect of fixing them all; and the act says, that the effect of such an acknowledgment shall not be lessened.

Rule discharged.

April 17.

ADAMES v. BRIDGER.

Plaintiff having proved under a commission of bankrupt in 1816, Held, estopped to sue for the same debt after the passing of 6 G. 4. c. 16. though that statute repeals 49 G. 3. c. 121. which makes proof of a debt an election not to sue.

DEBT on bond. A rule *nisi* had been obtained to stay the proceedings, commenced in 1831, on an affidavit that the Defendant had been a bankrupt in 1816, and that the Plaintiff had elected to prove under a commission sued out at that time.

Bompas Serjt., who shewed cause, alleged that no dividend had been received; and that by the statute 49 G. 3. c. 121. s. 14., the bankrupt act applicable to this subject in 1816, mere proof of debt, without receipt of dividend, would not discharge the bankrupt from proceedings at law; but that, at all events, he could not now avail himself of that statute, which, having been repealed by 6 G. 4. c. 16., must, according to the language of *Tindal* C. J. in *Kay v. Goodwin* (a), be considered as if it had never existed; and the new statute 6 G. 4. c. 16. could not be applied retrospectively to proceedings under former statutes. Thus, in *Surtees v. Ellison* (b), it was held, that evidence of a trading which ceased before the 6 G. 4. c. 16. took effect, will not support a commission of bankrupt issued after that time.

TINDAL C. J. By the 49 G. 3. c. 121. s. 14. it was enacted, "That after the 29th of *June* 1809, it shall

(a) 6 *Bingh.* 576.

(b) 9 B. & C. 750.

not be lawful for any creditor, who has or shall have brought any action, or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission for any purpose whatever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same; and that the proving or claiming a debt under a commission by any creditor shall be deemed an election by such creditor, *to take the benefit of such commission* with respect to the debt *so proved* or claimed by him;” and so long as that statute continued an act of the legislature, the mere proof of a debt under a commission of bankrupt was a complete election by the creditor not to proceed by suit: although not in form, it was, in substance, a discontinuance of any suit commenced at the time. It is true, that statute is now repealed; but for matters bygone and completed, we must look to the law then in force.

The fallacy is in considering the election to prove as an incomplete act. It was a complete act to effect a discontinuance; and, after such a lapse of time, the rule must be

Discharged, with costs.

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v.
BRIDGER.

WATSON v. WALKER.

April 17.

MEREWETHER Serjt. had obtained, upon affidavit, a rule *nisi* to set aside a writ of false judgment sued out by *Walker*, the Defendant below, in the above cause: but his affidavit was entitled “In the Common Pleas, *Watson v. Walker*,” upon which it was objected by

Entitling
affidavit in
false judgment.

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WALKER.

Jones Serjt. that the affidavit should have been entitled "*Walker v. Watson*," *Walker* being the Plaintiff upon the writ of false judgment.

Merewether answered, that he was compelled to entitle the affidavit in the Common Pleas in order to its being read; and that *Watson v. Walker* was the only cause in existence, his objection being, that the writ of false judgment was void. But

The *Court*, thinking that there was no such cause in the Common Pleas as *Watson v. Walker*, discharged the rule, without costs.

April 19.

NELSON v. CHERRILL and Another.

Defendant took goods under a second commission of bankrupt, while a former commission was subsisting: Held, they could not retain them, even against a colourable title, the second commission being void.

IN trespass for taking the Plaintiff's goods, the Defendants, at the trial before *Tindal* C. J., justified the taking under a commission of bankruptcy against one *Lloyd*, alleging that the Plaintiff had obtained the goods from *Lloyd* under a fraudulent bill of sale.

It appearing, however, that a prior commission, issued against *Lloyd* in 1821, was still in force, *Lloyd* having obtained no certificate under it, a verdict was found for the Plaintiff on the authority of *Fowler v. Coster* (a) and *Till v. Wilson* (b), which decide that a second commission is void if issued while a former commission is in force. (c)

Andrews Serjt. now moved for a new trial, alleging that the Plaintiff having no right to the goods, the Defend-

(a) 10 B. & C. 427.

(b) 7 B. & C. 684.

(c) But see *Ex parte Welsh*, *Montagu Rep. in Bkpty.* 276.

ants were entitled to retain them as against him; but the Court recognized the correctness of the above decisions; and

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CHERRILL.

TINDAL C. J. said, the Plaintiff was in actual possession, at least under a colour of title. The Defendants took the goods and set up a commission of bankrupt, which we are bound to call void. It would lead to great confusion, if they could then be allowed to set up the title of others to goods which were not their own.

Rule refused.

PALMER v. MARSHALL.

April 19.

POLICY of insurance effected *January 28th, 1831*, on the *Ruby* yacht of thirty-seven tons, at and from *Bristol to London*. The yacht, which was lying in the float at *Bristol* at the date of the policy, did not sail till the 17th of *May*, and was lost in the Channel three or four days after. In an action on the policy, the case having gone down to a new trial (a), *Park J.*, at the *Dorchester* assizes, nonsuited the plaintiff, on the ground of an implied deviation or variance of the risk, by an unreasonable delay in the time of sailing. It having been agreed that the plaintiff should stand in the same position as if the question had gone to the jury with a strong direction on the part of the Judge,

Insurance *January 28th*, on a vessel afloat, at and from *Bristol to London*. The vessel sailed on the 17th of *May* :

Held, that the delay, unaccounted for, was unreasonable, and discharged the underwriter, although the vessel was of a species which does not usually sail in the winter.

Bompas Serjt. now moved for a new trial, on the ground that the Judge ought not to have nonsuited, or to have directed a jury that there had been a variance of the risk by unreasonable delay. There had, in fact,

(a) See *ante*, 79. 153.

been

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been no variance of the risk ; unless, indeed, to lessen it. The vessel was described in the policy as a yacht ; the underwriter was bound to be conversant with the usage as to different classes of vessels ; and if so, with the usage as to yachts, which is, to sail only in the summer. As yachts do not go to sea in the winter, the delay from *January* to *May* was not unreasonable. And it is clear the risk was not varied, — which is the real question, *Mount v. Larkins (a)*,—for the Defendant would not have required a higher premium, if *May* had been named for the time of sailing instead of *January*.

TINDAL C. J. This was an insurance on the *Ruby* yacht, at and from *Bristol* to *London*. The policy bore date the 28th of *January* 1831, and the vessel remained in the float at *Bristol* from the date of the policy till the 17th of *May*, when she sailed on her voyage, and was shortly afterwards lost. A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is, at all events, in the near contemplation of the parties : and when we see that, in the present instance, the voyage was not commenced till the middle of *May*, we are bound to say that the delay was unreasonable unless it be accounted for. No doubt, whether there has been unreasonable delay or not, is properly a question for a jury ; and I take it up, therefore, as if it had been left to the jury, with a strong direction that the delay here was unreasonable. What I have to consider, therefore, is whether any facts have been stated by the Plaintiff to account for this delay. I find none suggested, beyond the circumstance that this vessel was described as a yacht upon the policy, and that yachts are usually laid up in the winter. But if the Plaintiff meant to rely on that, he should have taken a policy

(a) 8 Bingham. 195.

adapted to his purpose. He might have insured his vessel *in port* for a definite time, and on the voyage to be commenced afterwards; instead of that, he adopts a form of policy from which the underwriter must have understood that the vessel would sail within a reasonable time. Here the vessel lies by for more than three months, during which, in addition to the risk of the voyage, the underwriter is exposed to the risk of every accident which may happen in port. Where the delay is unexplained, and so great as to fix it with the character of unreasonableness in the mind of every reasonable person, the strongest direction to the jury, and a verdict for the Defendant, would be fully justified.

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PARK J. I am astonished at the argument which has been used to-day. There never was so clear a case. The risk on a policy at and from *Bristol* attaches at *Bristol*, and the language of the policy implies, that if the vessel be ready for sea, she shall sail without delay, unless the delay be accounted for. Here the vessel was lying in the float; and the circumstance of her being a yacht does not constitute any exception to the general rule. If the owner proposed that she should sail only in the summer, he should have insured accordingly, "in port and at sea." After the risk has attached, it lies on the assured to shew why he did not sail; and I offered to leave the question of delay to the jury, with a strong direction, when it was agreed that the Plaintiff should be nonsuited, standing in the same position with respect to the present motion as if the point had been so left to the jury. However, there is nothing in the case. The risk attached at *Bristol*; and the Plaintiff not having insured "in port and at sea," as he might have done, has given no reason for his delay in proceeding to sea.

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MARSHALL.

GASELER J. I am of the same opinion. The yacht being afloat at *Bristol* ought, according to the policy, to have sailed without delay.

ALDERSON J. Upon a policy like this, a delay in sailing, in order to be justified, must be a delay incurred for the purpose of the voyage; as in *Langhorn v. Allmutt* (a), where it was necessary to wait for the purpose of procuring simulated papers, without which the voyage could not be performed; or in *Raine v. Bell* (b), where the vessel waited for the purpose of taking in provisions. But here the vessel was afloat; no reason connected with the voyage is assigned for her remaining in port; and the risk of the underwriter is materially changed. Instead of the risk of a voyage performed within a reasonable time after the 28th of *January*, the Plaintiff has substituted the risk of lying in the port of *Bristol* more than three months, and a voyage at a different time.

Rule refused.

(a) 4 *Taunt.* 511.

(b) 9 *East*, 195.

April 19. KEY, Assignee of SHERWIN, a Bankrupt, v. SHAW.

A trader, having been denied to a creditor who called for money, was

after a little time seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward, said he was not at home:

Held, that a jury were properly directed to consider whether the trader "had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet a creditor, to a more retired part."

money due to him from *Sherwin*, when he was told *Sherwin* was not at home. Another creditor, who called about the same time for the same purpose, having received a like answer, became exceedingly boisterous, when *Mrs. Sherwin* appeared, and having endeavoured in vain to appease him, *Sherwin* was at length seen peeping over his wife's shoulder.

Hicks, another witness, stated, that he also called for money due to him, when *Sherwin* appeared from behind a partition at the back of the shop; but seeing the witness, immediately retired, and *Mrs. Sherwin*, who came forward, said her husband was not at home.

Upon this part of the case, *Basanquet J.*, before whom the cause was tried, directed the jury to consider "whether *Sherwin* had kept his house; had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely to meet with his creditors, to a more retired part."

The credit, however, of other witnesses called by the Plaintiff having been materially impaired, and his case being open to infirmatory observations in other respects, a verdict was found for the Defendant; whereupon

Taddy Serjt. moved for a new trial, on the ground of a misdirection as to the evidence of *Willis* and *Hicks*, and of the verdict being against that evidence. The learned Judge, he contended, had laid down the law too narrowly. "Beginning to keep his house," in the language of the statute, was not confined to a trader's secluding himself in a retired part of his dwelling, or locking himself up; it was equally a beginning to keep house, if the trader shirked from a creditor, by eluding his approach, even if he only retreated behind his wife's back. In like manner, the breach of an appointment was holden to fall within the words, "departing from his dwelling-house, or otherwise absenting himself,"

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Gillingham v. Laing. (a) The direction of the learned Judge would have been proper for a state of facts such as occurred in *Dudley v. Vaughan* (b); but it was likely to mislead the jury, where the keeping house was not so much by retiring to a less frequented part of it as by eluding the eye of the creditor.

TINDAL C. J. I think the Court ought not to grant a rule in this case. It has been objected that the learned Judge did not point the attention of the jury to that class of acts of bankruptcy on which the Plaintiff relied, and that he only put it to them to enquire whether the party had wilfully secluded himself from a creditor. Even if he had stopped there he could not easily have been misunderstood; for the jury might well apply the term *wilfully secluded* to a momentary concealment. But the learned Judge added words explanatory of what he meant by *wilfully secluded*, namely, whether the party withdrew himself from a part of the house where he was likely to meet with creditors to a more retired part? That exactly meets the testimony of *Hicks* and *Willis*; and as evidence was adduced on the part of the Defendant, on which the verdict of the jury might fairly proceed, the rule must be refused.

PARK J. The summing up of the learned Judge was as favourable for the Plaintiff as the case admitted; and the question was correctly put to the jury.

A mere omission to keep an appointment is not, as it has been suggested by my Brother *Taddy*, an act of bankruptcy. That was expressly determined in *Tucker v. Jones.* (c)

GASELEE J. concurred.

(a) 6 Taunt. 532.

(b) 1 Campb. 270.

(c) 2 Bingb. 2.

BOSANQUET

BOSANQUET J. My attention had been called to the precise point, by a reference to the case of *Fisher v. Boucher* (a); and I told the jury, that if the party had wilfully secluded himself from a creditor, he had committed an act of bankruptcy, explaining, at the same time, the sense in which I employed the term *secluded*.

Rule refused.

(a) 10 B. & C. 705.

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GALL V. ESDAILE.

April 25.

THIS was an action for recovering back the deposit paid by the Plaintiff as purchaser at a public auction of a freehold messuage and premises in *St. John's Lane, West Smithfield*, in the county of *Middlesex*, and interest thereon; and also for recovering the costs and damages sustained by the Plaintiff by reason of the Defendant's inability to establish a good title. At the trial before *Alderson J.*, *London* sittings in *Trinity* term 1831, a verdict was entered for the Plaintiff, damages 300*l.*, subject to the opinion of the Court on a case, which stated that the sale took place on or about the 1st of *July* 1828, and the Defendant delivered his abstract of title to the Plaintiff, purporting to be an abstract of the title of the said *William Esdaile* to a messuage or tenement and premises situate in *St. John's Lane, West Smithfield*, in the county of *Middlesex*, therein stating (among other things), according to the fact, that *John Mayor*, citizen and *lorimer* of *London*, being seised in fee-simple of two freehold messuages or tenements and premises, with their appurtenances,

"As to the rest of my estate, my two houses in *S.* and *T.* I give to my wife for life; after her decease, that in *S.* to my daughter, the other between my two sons. The rest of my estate of what kind soever, one third to my wife, the rest equally among the three children." The testator had no real property but the two houses:

Held, that the daughter took a fee in the house in *S.*

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tenances, one of the said messuages being situate in *St. John's Lane* aforesaid, and the other in *Togwell Court, Charterhouse Lane*, made his will, duly executed and attested, dated the 15th of *July 1735*, in the words following: that is to say, "I *John Mayor*, citizen and *lorimer of London*, being in health of body, and of sound mind, understanding, and memory, do make and declare this my last will as followeth:—Firstly, I give my soul to God, that gave it me, resting for the salvation thereof on the alone merits of Jesus Christ, my Redeemer; my body I commit to the grave, to be decently interred at the discretion of my executors hereinafter named: and as to such worldly estate as it hath pleased God to bless me withal, I give or dispose of as followeth:—First, to my brother, *Joseph Mayor*, one pound one shilling; and to his wife, *Sarah Mayor*, the same sune, to by each of them a morning ring. To my dear and loveing mother, the sum of five pounds. As to the rest of my estate, the two houses, one in *St. Joneses Lane*, the other in *Togwell Court, Chatchous Lane*, I give to my loveing wif, *Mary Mayor*, for her life; and after her decease, that in *St. Joneses Lane* to my daughter, *Mary Mayor*; the other betweane my two sons, *John* and *Joseph Mayor*, to be equally divided. As to the rest of my estate, of what nature soever, one third to my wife, and the rest to be divided equally among the three children. And I do hereby make my dear wife and brother, *Joseph Mayor*, joynt executors of this my last will, revoking all former wills by me at any time heretofore made, and declare this to be my only last will and testament. In witness hereunto I have set my hand and seale this 15th day of *July 1735*." The said *John Mayor* left no real property beyond that specifically stated in the will.

Mary Mayor, the daughter, survived the testator,
and

and also her mother; and her interest in the said premises in *St. John's Lane*, or *St. Jones's Lane* (which were the premises purchased by the Plaintiff), was, at the time of the sale, vested in the defendant.

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On the receipt of the said abstract of title, the Plaintiff objected to the title on the ground that *Mary Mayor*, the daughter, took a life interest only in the house in *St. John's Lane* under the specific devise in the will of the said *John Mayor*, her father, and the remainder in fee in one third part of two third shares thereof under the residuary disposition contained in the same will: so that the title to the remainder in fee of the one third share of the testator's widow, and of the two third parts of the two third shares devised to the testator's two sons, remained to be deduced from the widow and the sons.

The Defendant insisting that *Mary Mayor* took a fee in the entirety of the premises after the death of her mother, and the Plaintiff refusing to complete his purchase, the defendant, in *Michaelmas* term 1828, filed a bill in equity against the Plaintiff to compel a specific performance of the agreement for the purchase of the said premises; but the bill was, on the hearing, dismissed with costs.

It was agreed between the Plaintiff and Defendant, that, if the will of *John Mayor* was insufficient to pass the fee in the entirety of the said premises to the said *Mary Mayor* after the death of her said mother as aforesaid, the verdict should stand for the Plaintiff for the said sum of 300*l.*, but if otherwise the verdict was to be entered for the Defendant.

Scriven Serjt. for the Plaintiff. *Mary Mayor*, the testator's daughter took only an estate for life. It is true the word *estate* is sufficient to carry a fee, if, from

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the context of the will, such can be collected to have been the testator's intention. But it is the context which must determine the extent of that expression. *Whitelock v. Heddon*. (a) In *Denn d. Moor v. Mellor* (b) Lord *Kenyon* said, "In many of the cases that have been litigated, and in which it has been decided that the first devisee was only entitled to a life estate, one cannot but suspect, privately speaking, that it was the intention of the devisor to give the absolute property to the first taker; and Lord *Mansfield* used to observe that the common class of men imagined that they could devise a fee simple by the same words that are sufficient to give a piece of plate; but the contrary of such a supposition has now been decided by so many authorities that it would be dangerous to shake them; and in deciding on the construction of wills, we must not indulge in conjectures or wishes, but determine on the words used according to those authorities." And in *Pettward v. Percott* (c) it was held that under a devise of "my copyhold estate at P., consisting of three tenements, and now under lease," &c., but not specifically stating for what interest, an estate for life only passed. If the testator had devised the whole of his interest in the house to his wife and daughter, the residuary bequest would have been without meaning, and the devise of a remainder in fee in a portion of the premises is not inconsistent with the devise of an estate for life in the whole of them. *Ridout v. Pain* (d), *Doe d. Briscoe v. Clarke* (e), *Doe d. Moreton v. Fossick* (g). The title offered by the Defendant is, at all events, doubtful; and though, if he had shown a strict legal title, the Court would have given judgment in his favour, *Boyman v. Gutch* (h), yet

(a) 1 B. & P. 247.

(b) 5 T. R. 562.

(c) 7 Ves. jun. 547.

(d) 3 Atk. 486.

(e) 2 N. R. 343.

(g) 1 B. & Adol. 186.

(b) 7 Bingb. 379.

they

they will not compel the Plaintiff to accept a title which may give rise to a contest at law. *Curling v. Shuttleworth*. (a)

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Bompas Serjt., contra. Mary Mayor, the testator's daughter, took a fee in the house in question. In *Andrew v. Southouse* (b), Lord *Kenyon* says, "For nearly half a century it has been the wish of the Courts to give effect to the intention of the deviser as far as they can. It has frequently been observed that in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the deviser; and Lord *Mansfield* often said, it appeared to him that persons in general who made their own wills thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest." Here the intention of the testator to give a fee to his daughter may be inferred from the circumstance of his using the appropriate term when he proposed to limit a life-interest to his wife. And the word *estate* is sufficient to pass a fee, whether used alone, — *per* Lord *Kenyon* in *Denn v. Mellor*, and *Le Blanc J.* in *Roe d. Allport v. Bacon* (c), — or with words descriptive of locality, as in *Holdfast v. Marten* (d), *Roe d. Child v. Wright* (e), *Harding v. Gardner* (g), *Denn v. Hood* (h), and *Randall v. Tuchin* (i), which latter case is expressly in point for the Defendant; so that *Pettiward v. Prescott* may be considered as over-ruled. By the word *estate*, with which the testator has commenced the devise to his wife and daughter, the testator meant to designate the house in question; and if it were neces-

- (a) 6 *Bingh.* 121.
- (b) 5 *T. R.* 292.
- (c) 4 *M. & S.* 366.
- (d) 1 *T. R.* 411.

- (e) 7 *East*, 259.
- (g) 1 *B. & B.* 72.
- (h) 7 *Taunt.* 35.
- (i) 6 *Taunt.* 410.

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sary, the Court would transpose the word, and place in conjunction with the description of the house. *Cole v. Rawlinson.* (a)

Scriven. It is not disputed that the word *estate* will carry a fee, if an intention to that effect can be discovered in the will. But this will discloses no intention either way. The test is, whether the elision of the word will render the will inoperative as to the property in question, as it would have done in *Randall v. Tuchin*. Here it might be struck out without affecting the devise to *Mary Mayor*, or the effect of the residuary clause.

TINDAL C. J. The only question which we are called on to decide is, what is the intention of the testator to be collected from the language of this will? After commencing with a recital of his intention to dispose of his worldly estate, he bequeaths some pecuniary legacies, and then, by an intermediate clause, proceeds, "The rest of my estate, the two houses, one in *St. Joneses Lane*, and the other in *Togwell Court, Chatehous Lane*, I give to my loveing wif, *Mary Mayor*, for her life, and, after her decease, that in *St. Joneses Lane* to my daughter, *Mary Mayor*; the other betweane my two sons, *John* and *Joseph Mayor*." And the question is, whether, under this devise, the daughter took a fee, or an estate for life? We are of opinion the testator intended his daughter should take a fee. First, he has used the words, "the rest of my *estate*," which, it is admitted, are sufficient to carry a fee, unless there are other expressions indicating a different intention. And the general rule is clear. There are cases in which the word *estate* unaccompanied, has been holden to carry a fee. There are cases in which it has been held to have the same effect, al-

(a) 1 *Salk.* 234.

though

though accompanied with descriptive words, which might seem, at first sight, to restrain it to a description of locality. There is on this will no indication of an intention on the part of the testator to restrain the interest of his daughter to an estate for life; on the contrary, when he leaves the house to his wife for life, and afterwards to his daughter, it may be inferred he meant to leave to her the entirety of that which he had expressly devised to his wife for life. It aids this construction, that the testator had no other real property, and that the residuary clause could only apply to any little personal property which might remain to be divided among his wife and children. It may also be further observed in aid of this construction, that the construction contended for on the part of the Plaintiff would confer interests so complicated as are not likely to have occurred to any testator. The judgment of the Court, therefore, must be for the Defendant.

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PARK J. Looking at the whole will, I think it clear that the testator meant to devise a fee to his daughter *Mary*. And the argument which may be drawn from the circumstance that the testator manifestly knew the difference between an estate for life and an estate in fee, is sufficient to warrant this construction. When he means to limit the devise to a life interest, he uses the term *for life* expressly; when he means to devise a larger interest he omits it.

GASELEE J. I have no doubt whatever as to the intention of the testator to devise a fee to his daughter.

ALDERSON J. I should have had some difficulty if the case had not stated that the testator had no other real property; but when that is stated, and the residuary clause may apply to personal property, the devise

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to the testator's wife and daughter, standing **unconnected** with the residuary clause, is sufficient to **give the daughter a fee**. There must, therefore, be

Judgment for the Defendant.

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DOE v. CARTER.

Interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged is not strictly a condition precedent to ulterior proceedings.

THE trial of this cause having been put off at the instance of the Defendant, upon his undertaking to pay the costs of the day, a rule *nisi* had been obtained to set off the interlocutory costs so due to the lessor of the Plaintiff, against the costs on the verdict which was given for the Defendant.

Andrews Serjt. opposed the rule on the ground that the payment of these interlocutory costs was a condition precedent, without which the Defendant could not have been allowed to put off the trial. The Plaintiff, therefore, was entitled to stand in the same position as if he had received the costs at the time. In *Aspinall v. Stamp* (a), a defendant was by a Judge's order allowed to go to trial upon certain terms, upon payment to the plaintiff of a certain sum of money, and the costs incurred up to the date of the order; but the plaintiff having consented to the trial proceeding on those terms before the costs had been paid, it was held that the defendant, who obtained the verdict, was bound to pay those costs, and could not set them off against those afterwards taxed for him on the *postea*. *Andrews* also relied on the lien of the Plaintiff's attorney, who deposed that he should be a loser by the Plaintiff if these costs were set off.

(a) 3 B. & C. 108.

Wilde

Wilde Serjt. The payment of the costs in *Aspinal v. Stamp* was a condition precedent imposed on the Defendant, which the Plaintiff did not waive by consenting to go to trial; and that was the ground of the decision. But here the order for payment might be enforced at any time; and the Plaintiff could go to trial whether the costs were paid or not.

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As to the attorney's lien, his affidavit does not disclose any.

TINDAL C. J. The order for the payment of the interlocutory costs in this case was not, strictly speaking, a condition precedent; but it was a bargain of which the Defendant has had the advantage; and though if the Plaintiff's attorney had proceeded strictly he might at once have obtained the costs by attachment, that ought not to be urged too strongly against him, the omission being in effect an indulgence to the Defendant. We think, therefore, that upon the Plaintiff's attorney satisfying the prothonotary that any thing is due to him from the Plaintiff in respect of this cause, his lien should be allowed; and that, subject to such lien, the set-off prayed should be allowed.

Rule absolute accordingly.

HUTCHINSON v. BLACKWELL.

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WHEN this cause was at issue and the record had been passed, the jury process issued, and the *venire* had been returned by the sheriff, but before the *issue therein*, to the award of a barrister, does not authorize him to order a verdict to be entered up.

A submission to refer a cause, and the subject-matter thereof, and

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cause had been entered for trial, it was by a submission made in the Court of *King's Bench*, which recited that this action was pending in the Court of Common Pleas, agreed by the parties "to leave the same, and the subject-matter thereof, and the issue therein, and the costs of such action," to the arbitrament, final end, and determination of a barrister, and to abide by and perform such award, order, and determination as the said arbitrator should make of and concerning the matters, disputes, and differences subsisting between them as thereinbefore mentioned; that the costs of the reference, award, and action should be in his discretion; and that the submission thereby made should be made a rule of the Court of *King's Bench*.

The arbitrator ordered a verdict to be entered for the Plaintiff for 204*l.* 10*s.*, and that the Defendant should pay the costs of the cause.

The submission was made a rule of the Court of *King's Bench*.

Taddy Serjt. obtained a rule *nisi* to enter up a verdict pursuant to the award, or that the Defendant should withdraw his plea of not guilty (the action was in trover) and enter a *cognovit* for the sum of 204*l.* 10*s.*

Wilde Serjt., who shewed cause, objected, that under this submission the arbitrator had no authority to order a verdict to be entered; that no jury having been sworn, a verdict could not be entered on the *postea*; and that, the submission having been made a rule of the Court of *King's Bench*, this Court had no authority to interfere. When the Court called on

Taddy. The arbitrator having authority to decide the cause, the subject-matter thereof, and the *issue therein*, had, in effect, authority to enter a verdict, for

without that he could not determine the issue; and the application is necessarily made to this Court, as the Court of King's Bench have no authority over the record here. The agreement to abide by the award empowers the Court to carry it into effect, if not by verdict, at least by ordering a *cognovit* to be entered.

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TINDAL C. J. Probably either of the modes suggested would meet the substantial justice of the case; but we must look to see whether we have authority to do what is required. The terms of the submission are to leave the cause, the subject-matter thereof, the issue therein, and the costs to the award of an arbitrator.

Now, in ordinary cases, a provision is made that he shall be at liberty to enter a verdict, and that no writ of error shall be brought. That clause being omitted here, we must suppose the parties did not intend to give that authority to the arbitrator, or any power beyond that of proceeding by attachment for non-performance of the award. It is the fault of the parties that they have, perhaps inadvertently, made the submission a rule of the Court of King's Bench.

PARK and GASELEE Js. concurred.

ALDERSON J. I remember an award being set aside in the Court of Exchequer on the same objection.

Rule absolute.

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April 27. BELL and Another, Assignées of the Sheriff of MIDDLESEX, v. FOSTER and Others.

Omission in notice of bail to describe the bail as householders or freeholders, does not under the rule of *Trinity 1831*, authorise the Plaintiff to take an assignment of the bail-bond. The objection should be made when the bail come up.

NOTICE of bail served on the 30th of *January* last, in a cause between the Plaintiffs and *Foster and Churton*, omitted to describe the bail as freeholders or householders as required by the rule of *Trinity 1831 (a)*, the old form of notice having been pursued by mistake. The Plaintiffs, instead of objecting to the bail, on the 4th of *February* took an assignment of the bail-bond and commenced proceedings thereon. The Defendant having given a regular notice and put in and perfected other bail on the 11th of *April*,

Wilde Serjt., on the part of the bail to the sheriff, obtained a rule *nisi* to stay the proceedings on the bail-bond as irregular.

Jones Serjt. shewed cause, and contended, that the original notice of bail not being conformable to the rule of *Trinity 1831*, was a nullity; and that the Plaintiff being in the same condition as if he had received no notice, was entitled to proceed on the bail-bond. In *Wallace v. Arrowsmith (b)*, where the notice of bail was a nullity, it was held that an assignment of the bail-bond was regular.

Wilde. The notice here was merely informal, not null; the Plaintiff should have taken the objection when the bail came up. In *Wallace v. Arrowsmith*, the bail were attorneys' clerks.

(a) 7 *Bingh.* 782.

(b) 2 *Bas. & P.* 49.

TINDAL C. J. It appears to us that the notice was merely informal, and not a nullity. It is true, the rule of *Trinity* 1831 prescribes a form of notice; but it was not intended that every blank or omission in the form should authorise an assignment of the bail-bond: that would only be putting the parties to unnecessary expense, which it was the object of the rule to prevent. Objections of this nature should, as under the old practice, be made when the bail appear. In the case in *Bosanquet* and *Fuller* the bail were attorneys' clerks, who are not, under any circumstances, allowed to be bail.

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PARK and GASELEE Js. concurred.

ALDERSON J. By not taking the objection at the time, the party deprives the Court of the power of doing that which the justice of the case may require.

Rule absolute.

UMBRAGIO OBICINI v. BLIGH.

April 27.

THIS was an action of debt brought to recover a sum which the Plaintiff claimed to be due to him on a judgment of the Vice Admiralty Court of the island of *Malta*. At the trial of the cause before *Tindal C. J.*, *London* sittings after last *Trinity* term, a verdict was found for the Plaintiff for 299*l.*, subject to the opinion of the Court on the following case: —

In order to sustain a suit in *England* for damages awarded by an Admiralty Court abroad, the transcript of the proceedings in the Admiralty Court should shew expressly, and not by mere inference, the sentence of the Admiralty Court, and that the Defendant was within its jurisdiction.

The

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The Plaintiff was the administrator, under limited letters of administration, of *Gregory Mattei*, formerly of the island of *Malta*. The Defendant was a captain in his Majesty's navy, and at the time the cause of action arose, commanded a ship of war called the *Glatton*.

On the 5th of *January* 1809, a *Sicilian* vessel called *La Madonna della Lettera e Gesu Maria Giuseppe* was captured by the *Glatton* under Captain *Bligh*, and taken into *Malta*, when a claim was made for the said ship and cargo in the Vice-Admiralty Court at *Malta*; and it was upon the proceedings of that Court in that cause, that the present action was brought.

The Plaintiff produced in proof of those proceedings, a document under the seal of the said Court, of which the following is a copy:—

“*George* the Fourth, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland* King, defender of the faith: To all and singular persons of whatsoever dignity, state, degree, or pre-eminence they be, to whom these present letters testimonial shall come, greeting. We do by these presents make known and signify unto you, that upon examining the records of our Vice-Admiralty Court of the island of *Malta*, and territories thereunto belonging, kept by *John Locker*, Esq., the principal registrar of the said Court, we find certain interlocutory decrees, instruments, and proceedings, had, made, and prosecuted in our said Vice-Admiralty Court in a certain cause or business, intituled *La Madonna della Lettera e Gesu Maria Giuseppe, Francesco Micali*, master, taken by his Majesty's ship of war *Glatton*, *George Miller Bligh*, Esq., commander, and brought to *Malta*, to the tenor and effect, and at the times hereinafter expressed; to wit,

“On *Saturday* the 25th day of *February* 1809, before the Worshipful *John Sewell*, Doctor of Laws, Judge of the Vice-Admiralty Court of the island of *Malta*, and territories thereunto belonging, in the court room situate
in

in *Strada Mercanti*, in the city of *Lavaletta*, in the said island of *Malta* :

“ Present, *W. Stevens*, deputy registrar :

“ *La Madonna della Lettera e Gesù Maria Giuseppe, Francisco Micali*, master, taken by His Majesty's ship of war, *Glatton*, *George Miller Bligh, Esq.*, commander, and brought to *Malta*.”

On admission of the territorial claim for the ship and cargo.”

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“ *Rouverie*, for *Fenton*, prayed the claim of territory for ship and cargo to be admitted, and the ship and cargo to be restored with costs and damages.

“ *Jackson* prayed the cause to stand over until *Wednesday*, in order that the captain might translate certain letters of advice and invoices, to shew that part of the cargo did not belong to the subjects of his *Sicilian Majesty*.

“ *Rouverie* objected thereto, and prayed the cause to be heard immediately; whereupon the Judge directed the cause to be heard this day, both proctors agreeing to take the papers as translated. The Judge then gave leave to Mr. *Mattei*, the agent of his *Sicilian Majesty*, to amend his claim if he thought proper; whereupon the Court was informed Mr. *Mattei* wished to hear the claim as it then stood; whereupon the Judge having heard the evidences and proofs read, and advocates and proctors on both sides thereon, admitted the claim for the ship and cargo (save the goods mentioned in the bill of lading, No. 19.); pronounced the ship and cargo (saving as before) to belong as claimed; and, by interlocutory, decreed the same to be restored to the claimant for the use of the owners and proprietors thereof, and reserved the adjudication of goods in bill of lading, No. 19., and the question of costs and damages, to whensoever; and by further interlocutory decree pronounced freight to be due on said goods: decree of unlivery of goods in bill of lading, No. 19. *Jackson* prayed

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prayed a decree of inspection of said goods, which the Judge was pleased to reject.

“ On *Saturday* the 15th day of *April* 1809, before the Worshipful *John Sewell*, &c. on admission of the territorial claim as amended, and on the question of costs and damages, *Fenton* prayed the territorial claim inasmuch as amended to be admitted, and the remainder of the cargo to be restored, with costs and damages.

“ *Jackson* alleged that he did not object to the admission of said territorial claim as amended, but prayed the Judge to reject *Fenton's* petition for costs and damages. The Judge having heard the aforesaid claim and evidence, and proofs, read at the petition of *Fenton*, on motion of counsel, and with consent of *Jackson*, admitted the aforesaid claim; pronounced the goods to belong as claimed; and by interlocutory decree the same to be restored to claimant for the use of the owners and proprietors thereof; and having heard advocates and proctors on both sides, by further interlocutory decree pronounced the demurrage to be due from the day of the capture, viz. the 5th of *January*, to the 4th of *March* last, as also interest on the value of the cargo for such period, and special damage, if any could be shewn, but gave no costs; and further reserved the consideration of premium of insurance.

“ On *Wednesday* the 14th of *March* 1810, before the Worshipful *John Sewell*, &c. the deputy registrar's report, as to damages, is confirmed if not objected to by this day. The Judge was pleased to confirm the said report. Present, *Allen* and *Jackson*.

“ On *Saturday*, the 10th of *October* 1810, before the Worshipful *John Sewell*, &c. *Fenton* and *Allen* alleged, that on the 14th of *March* last the registrar and merchants' report as to special damages was confirmed, and that their clients had made repeated application to the captor's agent for the payment of the amount of
said

said special damages as confirmed, but that he had not been able to obtain the same; and prayed the Judge to decree a monition to issue forth against the said captors and their agent for the payment of such special damages, and which the Judge decreed accordingly.

“ Monition.

“ *George the Third*, by the grace of God of the United Kingdom of *Great Britain and Ireland* King, defender of the faith. To *John Chapman*, Gent., Deputy Marshal of the Vice-Admiralty Court of the island of *Malta* and the territories thereunto belonging, greeting: Whereas, the Worshipful *John Sewell*, Doctor of Laws, Judge of the Vice-Admiralty Court of the island of *Malta*, and the territories thereunto belonging, and also to hear and determine all and all manner of causes and complaints as to ships and goods seized and taken as prize, specially constituted and appointed, rightly and duly proceeding in a certain cause or business of prize, moved and prosecuted before him in our said Court on behalf of *George Miller Bligh*, Esq., commander of our ship of war *Glatton*, the captor of a certain vessel called *La Madonna della Lettera e Gesu Maria Giuseppe*, whereof *Francisco Micali* was master, against the said ship or vessel, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandizes laden therein, and also against *Gregory Mattei*, the claimant of the said ship and cargo, on the 15th day of *April*, in the year of our Lord 1809, by his interlocutory decree, decreed certain goods to be restored to the said claimant for the use of the owners and proprietors thereof, and condemned the captors in certain demurrage, costs, and special damages sustained by the claimants: And whereas on the 10th day of *October* instant, the said Judge rightly and duly proceeding at the petition of the proctors of the said claimants, alleging, that on the 14th day of *March* last the regis-

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trars' and merchants' report as to the special damages and demurrage was confirmed, and that their clients had made repeated applications to the captor's agent for the payment of the amount of said special damages and demurrage, but that they had not been able to obtain the same, hath decreed monition to issue forth against the said *George Miller Bligh*, the captor of the said ship and cargo, and *William Robertson*, the agent of the said captors, to pay to the said claimant the sum of 2991 *scudi*, 11 *taris*, and 11 *grains* of *Malta* currency, being the amount of said special damages and demurrage as confirmed, besides the charges of this monition, and the execution thereof, within fifteen days after service (justice so requiring); we do therefore charge and strictly enjoin and command you, that you omit not by reason of any liberty or franchise, but that you monish or cause to be monished, peremptorily and personally, the said *George Miller Bligh*, commander of our said ship of war *Glatton*, the captor of the above vessel and her cargo, and *Wm. Robertson*, the agent of the said captor, to pay, or cause to be paid, to the said claimant, or his proctors, the sum of 2991 *scudi*, 11 *taris*, and 11 *grains*, being the amount of such special damages and demurrage, as confirmed as aforesaid, besides the charges of this monition and the execution thereof, within fifteen days after service, under pain of the law, and the peril which will fall thereon; and that you duly certify to our aforesaid judge or his surrogate, what you shall do in the premises, together with these presents. Given at *La Valetta*, in our aforesaid Vice-Admiralty Court, under the seal thereof for causes, this 27th day of *October*, in the year of our Lord 1810, and of our reign the fifty-first.

“ ‘ *W. Stevens*, Dep. Reg.’

“ Monition against captors and agents to
pay special damages and demurrage.

“ *Fenton and Allen*, Proctors.”

Endorsed,

Endorsed, "I, *John Chapman*, deputy marshal of the Vice Admiralty Court of the island of *Malta*, and the territories thereunto belonging, do hereby certify that the within original monition was personally served on the within-mentioned *W. Robertson*, by shewing to him the within monition under seal, and by leaving with him a true copy thereof. And I do also certify that the aforesaid monition was not served on the within-mentioned *George Miller Bligh*, by reason of his having left this island some time ago, and that he has not at present returned to *Malta*. Witness my hand this 8th day of *November* 1810, &c.

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"*Madonna della Lettera*, &c. *Francisco Michali*, M^r. This 14th day of *November* 1810, appeared personally *John Chapman*, of the city of *Valetta*, gent., deputy marshal of the Vice Admiralty Court of the island of *Malta* and the territories thereunto belonging, and made oath that the contents of the certificate endorsed on the back of the annexed monition, and to which he hath subscribed his name, were and are true.

" Sworn before me,

" *Robert Forrist*.

" On *Monday* the 28th *November* 1810, before, &c., *Fenton* returned the monition duly executed, and prayed an attachment. *Jackson* appeared for Mr. *W. Robertson*, and alleged him not to be the agent of his Majesty's ship *Glatton*, and that he was not in possession of any effects belonging to the said ship, and prayed him to be dismissed from all observance of justice in that matter.

" All and singular which premises, as they have been drawn up and passed in our aforesaid Vice Admiralty Court, so we have thought fit that the same should be exemplified unto you; and we do attest that the same do agree, having been faithfully compared with their

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respective originals, remaining on record in our court aforesaid. In witness whereof we have caused the seal of our aforesaid Vice Admiralty Court to be hereunto affixed. Given at *La Valetta, Malta*, this 8th day of *May*, in the year of our Lord 1828, and of our reign the ninth.

“*J. Locker, Registrar.*”

A witness, who had practised for many years in the Vice Admiralty Court at *Malta* as a proctor, stated, that the usual course of proceeding in prize causes is, that the ship's papers and affidavits are first brought in before a surrogate, and that the ship's papers disclose who are the owners; after which a monition is directed to be issued, calling upon all persons to appear and make known their claims. This monition is usually stuck upon '*Change*'. After such monition is returned, the claim is generally made. It is a claim with an affidavit annexed in support of it; and such claim and affidavit shew in whose behalf and what right the claim is made. The claim and affidavit in the present cause are not comprised in the document produced. This cause is taken up from the admission of the claim. The witness stated he was not aware there were any other proceedings in the progress of the cause besides those which appeared in the document produced; and that he believed there were no steps taken before the first which was entered on the document produced, but that it did not contain a transcript of all the acts of court: there were other acts of court, such as assigning a proctor for the captors; returning the monition; and the affidavit and claim. He further stated, that he thought the document contained the whole of the proceedings from the monition, and that there would be no other formal adjudication beyond that which appeared on the document produced; that the

the monition set forth in the document produced is the last monition, and is served on the agent, if the party cannot be found, and there be an agent regularly appointed : after service of the last monition, an attachment issues if the money be not paid ; but an attachment does not issue without service of the last monition on the party, or an agent regularly appointed by him. Before the claim is put in, the captain, mate, and principal officers are usually examined.

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The *Glatton* was paid off in *England* in *October* 1809. Some evidence was given to shew that this judgment was still unsatisfied ; and that point was left by the Chief Justice to the jury, who found for the Plaintiff.

It was agreed that either party was to be at liberty to refer to the proceedings ; and the question for the opinion of the Court was, Whether the Plaintiff was entitled to recover ? If the Court should be of opinion that he was, then the verdict was to stand ; if otherwise, judgment of nonsuit was to be entered.

Stephen Serjt. for the Defendant. (a) There are five objections to the Plaintiff's recovering in this action.

First, it nowhere appears upon this transcript that the Defendant had notice of the proceedings in *Malta* ; on the contrary, it may be inferred, as in *Buchanan v. Rucker* (b), and *Cavan v. Stewart* (c), that the Defendant was never within the jurisdiction of the Court. Now in *Buchanan v. Rucker*, which was an action upon a judgment obtained against the defendant in the island of *Tobago*, the Court held the proceedings invalid, because it did not appear that the defendant had ever been in the colony, had property there, or was subject

(a) For the sake of avoiding repetition, the argument for the Defendant is stated first, although the Plaintiff's counsel commenced as usual.

(b) 9 *East*, 192.

(c) 1 *Stark*. 525.

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to the jurisdiction of the colonial court; and in *Cavan v. Stewart*, where the defendant was sued on a *Jamaica* judgment, Lord *Ellenborough* said, that it ought to have been proved that, at least, he was once in the island of *Jamaica*.

Secondly, the transcript offered by the Plaintiff of the proceedings in the Vice Admiralty Court is a document too imperfect for this Court to proceed on. If the Plaintiff was not bound to set forth the whole of the proceedings, at least he should have set forth the parts material to his own case; as, for instance, the appearance of the Defendant or the appointment of a proctor to act for him: above all, the judgment of the Court, which is nowhere stated. It lies on the Plaintiff to make the proper extracts, or to shew the whole of the proceedings, and that they are conclusive against the Defendant. *Plummer v. Woodburne*. (a)

Thirdly, it does not appear that these proceedings were final in the Vice Admiralty Court. According to the definition in *Brown's Civil Law*, p. 494., a sentence is interlocutory where a further sentence is to be expected. Upon this transcript it appears that many points remain to be adjudicated, and there is no finding that any precise sum is due from the Defendant. In *Emerson v. Lashley* (b) and *Fry v. Malcolm* (c) it was expressly holden that actions cannot be maintained on a mere interlocutory order. An action on a judgment only lies where a debt or duty can be implied which a court of law can recognise. And in *Carpenter v. Thornton* (d) the Court held that a contract could not be implied from a decree of a court of equity (in a suit for specific performance) to pay interest on the purchase-money of an estate. *Bayley J.*

(a) 4 B. & C. 625.

(b) 2 H. Bl. 248.

(c) 4 Taunt. 705.

(d) 3 B. & A. 52.

.said,

said, "The foundation of the suit in equity in this case seems to have been an equitable obligation, on the part of the Defendant, to pay the money. This action, if it can be maintained at all, must be founded upon a legal obligation to pay. The decree in equity merely ascertains that the Defendant is under an equitable obligation to pay; it does not go further, and shew that there is any legal obligation to pay." And *Holroyd J.* said, "In the case of judgments of inferior courts, and courts not of record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the Court will presume that the party promises to do that which the law requires. When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the Court which ordered it to be paid. The law, in such a case, does not imply a promise. There is no instance of an action brought on a rule of Court for payment of money. The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the Court. Now, although that does not absolutely shew that such an action is not maintainable, yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable." In *Henly v. Soper* (a) there was a balance of account and an agreement to refer, from which a promise to pay might be implied, and Lord *Tenterden* said, that the action would lie for the balance of an account, but not on every order of a court. In *Smith v. Whalley* (b) there was also an agreement.

Fourthly, it nowhere appears upon the transcript in what right *Mattei* acted, or that he had any interest in the subject of the suit. It is rather to be collected that he was a mere agent of the government whose rights

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(a) 2 Mann. & Ry. 153.

(b) 2 B. & P. 482.

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had been violated by the capture of the ship in question; such agents being usually parties to suits of this kind; *Twee Gebroeders* (a); but that would give neither to him nor to his administrator any interest in the sum now sought to be recovered. Thus in *Pigott v. Thompson* (b), where *A.* agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners;" it was held, that no action for the rent could be maintained in the name of the treasurer. And this Court may examine and impeach the legality of foreign judgments. *Arnot v. Redfern* (c), *Walker v. Witter*. (d)

Fifthly, this is in effect a question of prize or no prize, over which the Court of Admiralty has exclusive jurisdiction. Thus in *Le Caux v. Eden* (e) it was held that an action would not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship had been acquitted. And *Willes J.* said, "I am of opinion that the action is not maintainable. I may perhaps go upon narrower ground than the rest of the Court, but the rule I would lay down is, that, where the injury is the necessary and natural consequence of the capture, the Court of Admiralty has the sole and exclusive jurisdiction." And *Buller J.* said, "There is no case in which it has ever been holden that such an action would lie; and, if it could be maintained, there are, in every war, such frequent opportunities for it, that it must have happened in every day's practice, or some instances, at least, must have been in the memory of those who have had long experience in *Westminster Hall*; but there is not the smallest trace of such a

(a) 3 Rob. 162.

(b) 3 B. & P. 147.

(c) 3 Bingb. 351.

(d) Dougl. 1.

(e) Dougl. 594.

determination, or even *dictum*, in any Court in England."

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[*Alderson J.* In *Le Caux v. Eden* the Court were called on to draw an inference from the foreign judgment, namely, that the party was entitled to damages: here we are only asked to enforce the payment of the sum specified in the monition.] But that involves the original question of prize or no prize. The principle established in *Le Caux v. Eden* was acted on in *Mitchell v. Rodney* (a) and *Sinclair v. Fraser*, there cited.

Wilde Serjt. contra. 1. It sufficiently appears on this transcript that the Defendant had notice of the proceedings of the Court of Vice Admiralty, and was properly subjected to its jurisdiction. Indeed in the suit in that Court he must have been the actor, and have required the appearance of the parties interested in the captured vessel. That vessel is alleged to have been taken by the *Glatton*, of which the Defendant was the commander. Now it is the duty of the captor to proceed to condemnation; 33 G. 3. c. 66.; *Case of The William* (b), *The Huldah* (c), *The Susanna* (d); he is the only person liable for damages; and his acts bind all persons under him; *Diligentia* (e); and upon the evidence before this Court, the monition appears to have issued in a proceeding in the Court of Vice Admiralty for the condemnation of the *Madonna*. Every thing incidental to such a proceeding, such as the appointment of proctors, the examination of evidence, and all that precedes the sentence of the Court, must be presumed to have been rightly done. The Court must be accredited for the due observance of its own practice; and as the suit could not have existed except upon the captor or his agent pro-

(a) 2 Br. P. C. 423.

(d) 6 Rob. 48.

(b) 4 Rob. 214.

(e) 1 Dodg. 404.

(c) 3 Rob. 235.

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ceeding for condemnation, it sufficiently appears that he had notice of the suit, and was within the jurisdiction of the Court.

2. The Court of Vice Admiralty receiving credit for the correctness of its intermediate proceedings, the monition, which is equivalent to a writ of execution, refers to the judgment of the Court, and sufficiently establishes the existence and amount of a debt, the payment of which this Court will enforce. It is no doubt necessary that a certain amount should be shewn; *Hall v. Odber* (a); but when that is established, it is for the Defendant to impeach, if he can, the regularity of the judgment; *Galbraith v. Neville* (b); and the Plaintiff is not bound to set out the whole proceedings; *Appleton v. Lord Braybrook*. (c) In *Buchanan v. Rucker*, and *Cavan v. Stewart*, it appeared on the proceedings that parties entitled to notice had never been summoned to appear; though that would not invalidate a judgment where by the law of the country the Court had authority to proceed in the absence of the party; *Douglas v. Forrest* (d); but here the Defendant *Bligh*, being the actor in the Vice Admiralty Court, was the person to summon, not to be summoned.

3. The proceedings, as set out on this record, are not interlocutory in the sense in which that term is used in *English* law, but final and conclusive. Restoration of the captured vessel is ordered, and a sum to be paid for the damages of detention. Nothing further was to be expected from the Court, which is the test that the proceeding is at an end, and the judgment, though termed interlocutory in the civil law, has the effect of a definitive sentence. "Illud dicitur decretum interlocutorium, habens vim sententiæ definitivæ, quando illud decretum est

(a) 11 East, 118.

(c) 6 M. & S. 34.

(b) Cited in 4 T. R. 191.

(d) 4 Bingb. 686.

finale et non speratur alia sententia seu aliud decretum super illo articulo, re, vel causâ, sed per illud imponitur finis illi rei de quâ interlocutum est," (a) That is, on the main point of the suit, for the question of costs is incidental to every judgment, and does not affect its conclusiveness on the point to be decided. The 33 G. 3. c. 66. s. 28. expressly enacts, that the decisions of Admiralty Courts shall have the force of a definitive sentence. If so, the amount of damages awarded, which is sufficiently disclosed by the monition, is a legitimate cause of action in the Courts of this country. In *Gilbert's* treatise on debt (b) it is laid down "that the act of law, that is, the judgments or acts of courts of justice, may reduce men's acts of any sort to a certain value, whether they be acts of benefit, or of injury and injustice. And when a certain value is set upon such action, it creates a debt to the party to whom it is by law appointed, for, though there be no actual contract, yet the debt arises *ex quasi contractu*; for as it is common justice to repair injuries, so when the law has settled the compensation of the injury, the law supposes a contract engaging the party to make a compensation. Besides, the law being the common rule to settle all disputes, when once the quantum of the damage or injury is adjusted by the decision of one of its courts, that decision or judgment ought in right reason to create a debt, as much as if the parties themselves had chosen arbitrators to determine between them, who had awarded a certain sum of money, which, as has been already observed, might be recovered by an action of debt." So *Blackstone* says (c), "That if one hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of

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(a) *Oughton, ord. Judic. tit.*
123.

(b) *Gilbert's Law and Equity*, 390.

(c) 3 *Comm.* 159.

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debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." The principle, therefore, laid down by Lord *Tenterden* in *Carpenter v. Thornton*, that an action on a judgment only lies where the Court can review the grounds of the judgment, appears too narrow, for that would exclude actions on judgments of record. Even in *Carpenter v. Thornton*, Lord *Tenterden* takes a distinction between the judgments of courts in this country and those of foreign courts. The decision in *Henly v. Soper* shews that it was not intended to lay down the principle so broadly as it appears in *Carpenter v. Thornton*. There it was held that an action would lie upon the decree of a colonial court of equity for the balance of an account between partners. In such action the Court would look at the substance, without regarding the form of the proceedings upon which the decree was founded. And Courts here do not exact the proof of strict regularity in the proceedings of foreign courts. In *Molony v. Gibbons* (a) the Court assumed that the attorney in the foreign court was well appointed; and if the judgment in such a court appear to be final, *Bernardi v. Motteux* (b), it has always been held that an action lies here for the amount. *Walker v. Witter*. (c)

4. Whether *Mattei* was the person entitled to claim damages was altogether a question for the Court of Vice Admiralty, *Sinclair v. Fraser* (d), which cannot be presumed to have erred so far as to have admitted improper parties to the suit;

(a) 2 *Campb.* 502.(b) *Dougl.* 575.(c) *Dougl.* 1.(d) 20 *Howell's St. Tr.* 468.

5. And the less, as that Court has undoubtedly exclusive jurisdiction in the question of prize. So that the Courts here will not interfere by prohibition, even if they take a view of the law on that subject different from the view taken by the Admiralty Court; *Lord Camden v. Home* (a); and whatever is incidental to such a question, as the amount of damage or the like, can also only be tried there; *Faith v. Pearson* (b), *Smart v. Wolff* (c); but when the amount to be paid has been once ascertained, a debt is established, the discharge of which the Courts here will enforce by the same remedies as any other debt.

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TINDAL C. J. Shaped as these proceedings are, the Court cannot with sufficient certainty see on the face of them that which is necessary to make the Defendant liable in this action; and what weighs most with me is, that the Defendant nowhere appears to have been brought within the jurisdiction of the Vice Admiralty Court, but that the proceedings, as set out, are upon the face of them imperfect. The only mention of the Defendant is where the captured vessel is styled "*La Madona della Lettera*, taken by his Majesty's ship of war *Glatton*, *George Miller Bligh*, Esq. commander, and brought to *Malta*." Now that mode of expression does not convey the idea that *Bligh* was present on the occasion of the proceedings in the court at *Malta*, for a captured vessel is commonly sent to port for condemnation in charge of a prize master. Neither does it appear that he was present in *October* 1810, when application was made for a monition; for it is granted upon an allegation that the proctors had made "repeated applications to the captor's agent for the payment of the amount of the special damages as confirmed, but that they had not been able

(a) 1 H. Bl. 476. 4 T. R.
382. 6 Br. P. C. 203.

(b) 2 Marshall, 133.

(c) 3 T. R. 323. 343. 345.

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to obtain the same." On the contrary, it appears, from the language of the return to the monition, that he was not present, the deputy marshal certifying that "the monition was not served on the within-named *George Miller Bligh*, by reason of his having left the island some time ago, and that he has not at present returned to *Malta*." It is left in uncertainty when he quitted the island, and we may fairly infer that if it had been possible, it would have been stated on the proceedings that he was present. But I do not rely on that alone, for his personal attendance was not strictly necessary, and it was, as has been forcibly urged, his duty to proceed to a port for the due condemnation of the captured vessel. Still there was something to be done in the Admiralty Court on his part and with his authority; the appointment of a proctor ought to have been properly authenticated; and if that took place, I cannot see why the statement of it is omitted on this transcript. A proctor has much more power than an attorney; he is styled *dominus litis*; he is appointed with solemnity by an instrument under seal, or by the Judge; and his appointment is a matter of record; *Clerke's Praxis*, 2d part. It appears, on this transcript, that all the proceedings of the Court have not been set out, for it recites, "The Judge having pronounced the goods to belong as claimed, and *by interlocutory decree* the same to be restored to the claimant for the use of the owners and proprietors;" but this interlocutory decree is nowhere set out. Now it was the business of the Plaintiff at least to make the necessary selection for the information of this Court; and the fair inference from the omissions is, that the whole of the proceedings, if set out, would not have shewn the appointment of any proctor for *Bligh*. It further appears that no agent of *Bligh's* resided in *Malta*. The monition indeed is served on *Robertson*, but in the next proceeding it is stated that

Jackson

Jackson appeared for him, and “alleged him not to be the agent of his Majesty’s ship *Glatton*, and that he was not in possession of any effects belonging to the said ship.” This allegation is not contradicted, but thereupon the proceedings terminate; from which we must infer that the applicants were incompetent to deny the allegation of *Jackson*, and that *Robertson* must be taken not to have been the agent of the Defendant. If so, the proceedings against him have been carried on when neither he was present nor any proctor or agent to attend to his interests. And though the Plaintiff has set out the monition, which is in the nature of a writ of execution, he has nowhere stated the judgment on which that monition is grounded. When the Plaintiff had the power of producing the proceedings which have been thus withheld, we should proceed in the dark if without more precise information we were to hold the Defendant liable. It is of extreme importance that the Plaintiff should be held strictly to the proof of his claim, for the consequences would be serious to the Defendant if he should be held liable to this demand after a lapse of twenty-two years; when he can neither investigate the claim nor recover over from parties who originally might have been liable to contribute. The ground of my decision, however, is, that I do not see my way on these proceedings, which are manifestly so imperfect, to find the Defendant liable. On that ground alone I think there ought to be judgment of nonsuit.

PARK J. It is not necessary for us to proceed on any other ground than the glaring defect of these proceedings. No libel is stated, no responsive allegations. It does not appear for whom *Mattei* claimed, nor what was the judgment on the subject of damages; the monition is ordered to be served on *Bligh* or his agent, and it is served on *Robertson*, who disclaims being agent,

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agent, or having any effects of the captors. In short, the whole proceedings are so imperfect that it is impossible for us to come to any decision on them, and after a lapse of twenty-two years, the case has an extremely suspicious appearance.

GASELEE J. I think there can be no doubt of the authority of this Court to entertain the Plaintiff's suit, if the judgment in the Vice Admiralty Court had been properly set out; for that judgment appears to have been final. And as to the appearance of the Defendant *Bligh*, there is a great deal in the argument, that he, as captor, was bound to take the cause into the court at *Malta*: but the ground of my decision is, that this transcript discloses no decree for the payment of any specific sum: for the monition is no part of the judgment; it is either the equivalent of a writ of execution, or a prelude to it by way of attachment; and this Court cannot consider an instrument in such a form as sufficient evidence of a judgment to the same amount. The transcript, therefore, being defective in not stating a decree for any specific amount, the Plaintiff has failed to establish any cause of action, and a nonsuit must be entered.

ALDERSON J. I am of the same opinion. The proceedings, as set out, are too imperfect to enable us to give any judgment but that of nonsuit. The Plaintiff sues as administrator of *Mattei*, and should, therefore, shew who *Mattei* was, and in what right he claimed. But many important parts of the proceedings are not set out, such as the appointment of a proctor for the Defendant *Bligh*, and the statement in detail of *Mattei's* claim. The Court directs the restoration of part of the cargo, and refers it to a body of merchants to ascertain the amount of damage, if any, sustained by the owners of the property. The report of the merchants is stated to

to have been afterwards confirmed, but what the report was nowhere appears, nor the amount found to be due for damages; for the monition cannot be taken as part of the judgment of the court, or evidence of the sum specified in the decree. If the proceedings stopped there, they would be too imperfect for us to rest any decision upon them, but the monition ordering that a certain sum shall be paid by the agent of the captor, is served upon *Robertson*, who disclaims the agency, or that he has any effects belonging to the *Glatton*, and what is done after that does not appear. It is perfectly consistent with all that appears on this record, that another monition may have issued, and that the money may have been paid. The proceedings set out, being therefore so imperfect, the Court has no alternative but to pronounce

Judgment of nonsuit.

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DUNCAN v. PASSENGER.

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UPON special demurrer it was objected that the declaration in this cause was destitute of any allegation of venue. In the margin alone, there was "*Middlesex* to wit;" and a certain day being specified, all the material facts were alleged to have taken place "then and there."

The county in the margin of the declaration held a sufficient venue, on special demurrer.

Adams Serjt. argued, that though this might suffice on general demurrer, *Mellor v. Barber* (a), to allow it on special demurrer, would be to dispense with the necessity of observing any of the formal rules of pleading, more especially of alleging facts with the ancient certainty as to time and place.

(a) 3 T. R. 387.

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Sed per Curiam. There, in the allegation "*then and there*" must apply to the county named in the margin, and is, therefore, a sufficient allegation of place.

Judgment for Plaintiff.

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OAKLEY v. ADAMSON.

From a covenant in the Defendant's lease, to contribute with other occupiers of the lessor's property a rateable proportion of the expense of keeping up paths used in common between them, coupled with the fact that the Plaintiff had always used a path between his house and the Defendant's from a period anterior to the Defendant's lease, and that there was no other path to which the covenant could apply, the Court inferred, that the soil of the path, which was included in the demise to the Defendant, was demised subject to a right of way in the Plaintiff.

IN this action the Plaintiff claimed a right of way along a passage between his house and the Defendant's, under a lease granted to him in 1819, but the property was in *Middlesex*, and the lease not being registered, it could not be produced in evidence. The Defendant at the trial relied on a registered lease of 1820, from the same lessor, which conveyed to him all ways, &c. and, without exception or qualification, the soil over which the Plaintiff claimed the right of way.

The Defendant's lease, however, contained a covenant, by which he engaged to contribute with the other occupiers of the lessor's property, a rateable proportion of the expense of keeping up paths, &c. used in common between them; and it was proved by a former occupier of the Defendant's house, in partnership with the Defendant at the time, that the Plaintiff had used the path in question ever since he came to occupy his premises in 1814, and that there was no other path to which the covenant could apply. The jury found for the Plaintiff a right of way on foot.

Andrews Serjt. obtained a rule *nisi* for a new trial, on the ground that the absolute grant of the soil to the Defendant was incompatible with the right of way claimed by the Plaintiff under the same lessor.

the demise to the Defendant, was demised subject to a right of way

Wilde

Wilde Serjt., who shewed cause, relied on the covenant in the Defendant's lease, which, explained by the usage, was sufficient to shew that the lessor had granted the premises to the Defendant subject to the right of way.

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Andrews contended, that the Defendant's lease, conveying to him, without ambiguity, an absolute right in the soil, ought not to be qualified by parol evidence.

TINDAL C. J. The lease containing the grant of the right of way to the Plaintiff cannot be read, and we may assume that the lessor meant to convey the soil of the passage in question to the Defendant: but he has also inserted in his lease to the Defendant a covenant that the Defendant shall contribute with the other occupiers a rateable proportion of the expense of repairing paths, &c. enjoyed in common; and there is no path but the path in question to which the covenant can apply. Are we to give any effect to that covenant or not? If we are to do so, the lease to the Defendant is not incompatible with the grant of a prior right of way to the Plaintiff. On the face of the lease there is a stipulation consistent with the existence of a right in some other person: we may, therefore, look at the facts to explain the nature of this stipulation, and they shew that the Plaintiff used the way from a period anterior to the date of the Defendant's lease, and while the Defendant's partner occupied the adjoining premises. We are, therefore, satisfied that the Defendant had notice that he took this property subject to a servitude or right of way, and that the verdict ought not to be disturbed.

PARK J. Assuming that the Defendant took the soil of the passage under his lease, where is the inconsistency that another should have a right of way over it. Coupling the testimony in the cause with the cove-

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nant in the Defendant's lease, I think it clear that the lessor did not mean to derogate from the Plaintiff's right of way.

GASELEE J. As there was no other path to which the covenant could apply, the parol evidence puts an end to the case.

ALDERSON J. I am of the same opinion. The question is merely on the construction of the Defendant's lease.

Rule discharged. (a)

(a) *Morris v. Edgington*, 3 Taunt. 24. *Koojstra v. Lucas and Others*, 5 B. & A. 830.

April 30.

HANCOCK and Another, Assignees of NICHOLLES,
 a Bankrupt, v. CAFFYN.

Defendant, a leaseholder, underlet to N. and put him in possession under an agreement to grant a lease when N. should have paid 1200*l.*, which he was to do by instalments in three years, in the mean time paying rent at certain days to De-

CAFFYN, being possessed of a house which he held on a long lease from *Harrison* the owner, put *Nicholles* in possession of it by an agreement under seal bearing date *September* 10. 1828, in which he covenanted to grant *Nicholles* a lease of the premises by indenture, when *Nicholles* should have paid for furniture and other considerations, 1200*l.*, which he was to do by instalments in three years: *Nicholles* covenanted, in the mean time, to pay 250*l.* a-year to *Caffyn* for the rent; and that if the rent were in arrear *Caffyn* should be at liberty to enter and distrain.

Nicholles duly paid his rent to *Caffyn*, but *Caffyn* omitted to pay what was due from himself to *Harrison*;

Defendant, subject to distress for nonpayment. Defendant received rent from N. but omitted to pay the superior landlord, who distrained on N. for arrears due from Defendant. N. having become bankrupt, Held, that the damage incurred by this distress was a cause of action on which his assignees might sue.

where-

whereupon, on the 21st of *October* 1829, when only a quarter's rent was due from *Nicholles* to *Caffyn, Harrison*, the superior landlord, distrained on *Nicholles* for 125*l.*, being half a year's rent due from *Caffyn* to *Harrison* on the 24th of *July* preceding. *Nicholles's* goods were sold to a disadvantage, and he had also to defray the expense of the distress. Shortly afterwards *Caffyn* himself distrained for a quarter's rent. *Nicholles* then became bankrupt, and his assignees brought this action against *Caffyn* for the damage incurred by *Nicholles* in having been so as aforesaid subjected to *Harrison's* distress.

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The first count of the declaration stated, that before and at the time of committing the grievance by Defendant, as thereafter next mentioned, the Defendant held and enjoyed a certain messuage, cottage, and premises, situate in the parish of *St. George, Hanover Square*, in the county of *Middlesex*, as tenant thereof to one *John Harrison*, at and under a certain yearly rent, to wit, the yearly rent of 250*l.* payable by Defendant to said *John Harrison*, to wit, at *London*: that whilst Defendant was such tenant to *J. Harrison*, and before and at the time of committing the grievance thereafter next mentioned, and before *John Nicholles* became a bankrupt, to wit, on the 21st *October* 1829, to wit, at &c., *John Nicholles*, at the special instance and request of Defendant, had become and was tenant to Defendant of said messuage, cottage, and premises, with the appurtenances, at and under a certain yearly rent, to wit, the yearly rent of 250*l.*, payable to Defendant quarterly on the 10th *December*, 10th *March*, 10th *June*, and 10th *September* in every year, to wit, at &c.; and thereupon it then and there became and was the duty of Defendant, so long as Defendant continued such tenant to *J. Harrison*, and so long as *J. Nicholles* continued such tenant to Defendant, to pay said first-mentioned rent to *J. Harrison*, and to indemnify and save harmless

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J. Nicholles from and against the payment of any of said rent so payable to *J. Harrison* over and beyond the amount of said rent so payable to Defendant as aforesaid, which might be due and in arrear from *J. Nicholles* to Defendant, and from and against any distress, or costs, charges, damages, or expenses which should or might be made, arise, or happen to *J. Nicholles* for or by reason of the non-payment thereof; and although said tenancy of Defendant to *J. Harrison*, and said tenancy of *J. Nicholles* to Defendant, was and continued for a long time until and after the committing of the grievances thereafter next mentioned, and although a small sum of money only, to wit, the sum of 84*l.* 17*s.* 10*d.* of rent was due and in arrear from *J. Nicholles* to Defendant at the time of committing the grievances thereafter mentioned, yet Defendant, not regarding his duty aforesaid, but contriving and fraudulently intending to injure and defraud *J. Nicholles* in that behalf, before he became a bankrupt, and said Plaintiffs, as assignees, as aforesaid, after he became a bankrupt, did not nor would, during the continuance of said tenancies, pay said first-mentioned rent to *J. Harrison*, or save harmless or indemnify *J. Nicholles* according to his duty, but wholly neglected so to do; and by reason thereof, during the continuance of said tenancies, and before *J. Nicholles* became a bankrupt, to wit, on &c., at &c., a certain distress was made by and on the behalf of *J. Harrison* on divers goods and chattels of *J. Nicholles*, to wit, &c., of great value, to wit, of the value of 400*l.*, then in and upon said messuage, cottage, and premises, for a certain sum of money, being in amount much over and beyond the amount of said rent so due and in arrear from *J. Nicholles* to Defendant, to wit, the sum of 125*l.* then due and in arrear from Defendant to *J. Harrison* for and in respect of said rent so payable to him as aforesaid: and said *J. Harrison* afterwards, to wit, on, &c., at &c., sold
 said

said goods and chattels as such distress as aforesaid, for and towards payment and satisfaction of said rent so due and owing to him from Defendant, and of the costs and charges of said distress, and incidental thereto; and *J. Nicholles* before his bankruptcy, and said Plaintiffs, as assignees as aforesaid, since his bankruptcy, had been and were much prejudiced, injured, and damaged by means of the premises, to wit, at &c.

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There were several other counts, varying the statement of the same injury, and claiming damages for the distress by *Caffyn* at a time when, in consequence of the payment to *Harrison*, nothing was due. By the agreement of 10th of *September* 1828, in consideration of 400*l.* paid down, and 1200*l.*, with interest, to be paid by instalments in three years, *Caffyn* agreed to sell *Nicholles* the furniture on the premises, and covenanted that he would, immediately after the full payment of the sum of 1200*l.* and interest, pursuant to the covenant in that behalf thereafter contained, well and effectually, by indenture, demise and lease unto the said *J. Nicholles*, his executors, administrators, and assigns, all that messuage or tenement situate and being No. 21. in *Lower Grosvenor Street*, in the parish of *St. George, Hanover Square*, in the county of *Middlesex*, with the cottage built behind the same, and all the appurtenances thereunto belonging, as the same had been for some time prior to the execution of that agreement, in the occupation of the said *J. Caffyn*, and of which possession had been or was intended to be given that day to the said *J. Nicholles*; to hold the same unto him the said *J. Nicholles*, his executors, administrators, and assigns, from the day of the date of that agreement, for the term of twenty-five years, at the yearly rent of 250*l.*, payable quarterly; that, in such indenture of lease there should be contained the like covenants and agreements on the part of the said *J. Nicholles*, his exe-

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cutors, administrators, and assigns, as were contained on the part of the lessee in the indenture of lease whereby the said *J. Caffyn* held the said premises, with others, and also all other usual and reasonable covenants, provisions, clauses, and agreements whatsoever. *Nicholles* then covenanted that he would, "in the mean time, and until such lease should be granted, well and truly pay or cause to be paid unto the said *J. Caffyn*, his executors, administrators, and assigns, the said yearly rent or sum of 250*l.* on the respective days and in the manner thereinbefore appointed for payment of the same; and also well and truly observe, perform, and keep all and singular the covenants and agreements which would be to be performed and kept by him the said *J. Nicholles*, his executors, administrators, or as signs, in case the said lease was actually granted: Provided always, and the said *J. Nicholles* did thereby for himself, his heirs, executors, administrators, and assigns, covenant, grant, and agree to and with the said *John Caffyn*, his executors, administrators, and assigns, that if at any time thereafter, before the said lease should be granted, the said yearly rent or sum of 250*l.*, or any part thereof, should be unpaid for the space of fourteen days next after any or either of the quarterly days of payment thereinbefore appointed for payment of the same, then it should be lawful for the said *John Caffyn*, his executors, administrators, or assigns, to enter upon the said premises thereinbefore agreed to be demised, or any part thereof, and to distrain for so much of the said quarterly rent as should be in arrear."

Damage to a considerable amount having been proved at the trial, a verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside and enter a nonsuit on objections taken at the trial.

Jones Serjt. moved accordingly on three objections, First, that the Defendant had no such duty to perform

form towards *Nicholles* as that required at his hands, unless the relation of landlord and tenant existed between him and *Nicholles*; that such relation could not exist without an actual demise; and that the agreement of September 10. 1828 contained no such demise.

Secondly, that if a tenancy could be assumed, and such a duty be implied, the remedy was by action on the written agreement, and not by an action on the Case for a supposed breach of duty.

Thirdly, that the right of action, if any, was one which did not pass to the assignees of the bankrupt.

He also objected to the amount of damages.

A rule *nisi* having been granted,

Wilde and *Spankie* Serjts. showed cause. The agreement of the 10th of September 1828 establishes the relation of landlord and tenant, by giving *Nicholles* immediate possession, stipulating for the payment of rent, and, above all, containing a power of distress.

If the relation of landlord and tenant be assumed, it is a consequence of the contract which creates it that the landlord should impliedly be responsible for the quiet enjoyment of the tenant; and for the disregard of this duty the tenant may sue in *assumpsit* or in case, although the details of the contract are contained in an instrument under seal. In *Burnet v. Lynch* (a), it was held that case (not *covenant*,) lay by the assignor against the assignee of a lease assigned by *deed poll*, upon his implied duty to perform the covenants in the original lease, although the assignor had, by the assignment, parted with all his interest; and although *assumpsit* might lie, that case was the better form of action for the injury sustained by the assignor in consequence of the assignee's breaches of covenant.

(a) 8 D. & R. 363.

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And this right of action passes to the bankrupt's assignees; for though they cannot sue for an injury to the person of the bankrupt, injury to his property, which diminishes the fund available for creditors, gives the bankrupt's assignees that right of compensation of which the creditors are to have the benefit. In *Smith v. Coffin* (a), Buller J. said, "The Court is bound to construe the bankrupt laws in the most liberal and beneficial manner for the creditors. I therefore hold, that every species of right, of which by any possibility profit can be made, passes to the assignees." In like manner, ever since the statute 4 Ed. 3. c. 7., executors have been entitled to recover in respect of any damage to the property of their testator, although an action for injuries to the testator's person does not accrue to them.

Jones. The stipulation for a lease to be granted after the payment of a certain sum of money is conclusive to shew that the agreement between *Nicholles* and *Caffyn* did not operate as an actual demise, but merely as an agreement for a demise: *Dunk v. Hunter* (b). But even if it operated as a demise, the Plaintiff ought to have sued on the written contract. He cannot resort to an implied contract, where there is a writing to settle the rights of the parties. His remedy, therefore, was by covenant; for though *assumpsit* or case may lie indifferently where the Defendant fills a certain known character, as carrier or banker, yet in ordinary cases, if there be a written contract, the party aggrieved is confined to such remedy as that contract affords him. At all events, this right of action does not pass to the assignees: they could not have sued in trover, for the goods were rightfully taken; *Wallace v. King* (c); and if they could not recover the goods, neither can they recover for an injury occasioned

(a) 2 H. Bl. 463. (b) 5 B. & Ald. 322. (c) 1 H. Bl. 13.

by taking away the goods. There are no words in the bankrupt act, 6 G. 4. c. 16., large enough to pass a right of this description.

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TINDAL C. J. I think this rule ought to be discharged. The first objection which has been made to the verdict for the Plaintiff is, that an allegation on the record of a demise by the Defendant *Caffyn* to *Nicholles*, has not been made out in evidence, and that the relation of landlord and tenant between them has not been established. The evidence adduced to establish that point was the agreement of the 10th of *September* 1828; and undoubtedly, in its main object and purport that agreement appears to be executory; for if we look at the whole situation of the parties, much remained to be done before the contract would be complete. Part of the agreement was, that upon payment of a stipulated sum, a lease by indenture should be granted; and if that had been the whole, it would have been difficult to say that the relation of landlord and tenant subsisted: but *Nicholles* was to be put into immediate possession; he was to pay rent on certain specified days; and it is difficult to say that the mere stipulation for a future lease shall defeat the relation which arises upon such a stipulation for payment of rent. However, it is not necessary to say in this case that there was a letting by actual demise; it is sufficient to say that the relation of landlord and tenant existed, although the lease by indenture had not been executed; and if any doubt on that point could arise from the terms of the agreement, *Caffyn* has ended such doubt by his own voluntary act, for in *October* following, before any lease by indenture had been executed, he puts in a distress for rent, which he could not legally do unless the relation of landlord and tenant existed. He cannot be allowed to distrain on the supposition that a tenancy existed,

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existed, and afterwards to deny the existence of such tenancy.

The second objection is, that, admitting the existence of the tenancy, there is no such implied duty on the part of the landlord as this action supposes. The duty alleged is, that *Caffyn*, by paying over to the superior landlord the rent received from the under-tenant, should protect the under-tenant from the superior landlord's distress. And that is no more than one of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment. Even if there be no actual agreement by the mesne landlord to pay over to the superior landlord the rent received from the under-tenant in order to secure his quiet enjoyment, still, in the case of *Burnet v. Lynch*, it was held to be an implied duty on the part of the assignee of a lease to perform the covenants contained in it, in order to keep the assignor harmless: if that be a duty in the assignee, it is not easy to see why it should not be correlatively the duty of the assignor to protect the assignee by paying over to the lessor the rent received from the assignee. And *Burnet v. Lynch* is also an authority that case is the more proper form of action, although *assumpsit* may also lie. And there are many other instances where, upon a duty which the law implies, the remedy is either by *assumpsit* or case.

The third objection is, that, at all events, no such right of action as this passes to an assignee under the bankrupt law. Undoubtedly, there is a large class of actions, in which, though an action lies for the bankrupt, the right does not pass to his assignees; as for injuries to person or reputation: but we should not give due effect to the statute, if we were to hold that a right did not pass arising out of an injury which has lessened the amount of the fund belonging to the creditors. The words of the statute 6 G. 4. c. 16. are very

com-

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comprehensive; in s. 12. it is enacted, "That the commissioners shall take such order and direction, with the body of such bankrupt, as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, both within this realm and abroad, as well copy or customary hold as freehold, which he shall have in his own right before he became bankrupt, as also with all such interest in any such lands, tenements, and hereditaments, as such bankrupt may lawfully depart withal, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found or known, and make sale thereof in manner hereinafter mentioned, or otherwise order the same, for satisfaction and payment of the creditors of the said bankrupt." And by the sixty-third section it is enacted, "That the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate; and the commissioners shall also assign as aforesaid all debts due or to be due to the bankrupt, wheresoever the same may be found or known; and such assignment shall vest the property, right, and interest in such debts in such assignees, as fully as if the assurance whereby they are secured had been made to such assignees."

When the statute directs an assignment of all the bankrupt's present personal estate, how can we except a right in respect of which the fund accruing to the creditors would receive compensation to the extent to which the property of the bankrupt has been diminished. The case of executors affords a close analogy: they cannot sue for any injury to the person of the testator; but in respect of an injury to the property which would have

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have formed part of the assets, they are entitled to recover.

As to the amount of the damages, we see no grounds for interfering.

PARK J. I am of the same opinion. The Defendant himself has put a construction on this contract by distraining on the Plaintiff, and shewing thereby that he considered himself to stand in the relation of landlord. *Burnet v. Lynch* is in point as to the form of action; and the right sought to be enforced is one which undoubtedly passes from the bankrupt to his assignees. The fallacy lies in the generality of the term "personal action." It is true, that a right of action for an injury to the person does not pass to the assignee; but for an injury to the bankrupt's personal property he is entitled to sue.

GASELEE J. If the agreement between *Nicholles* and *Caffyn* does not constitute a demise, I do not know what does. *Nicholles* is to enter into immediate possession; is to occupy for many months before an indenture of lease is executed; is to pay rent, and to be subject to distress. The objection as to the form of action is answered by the decision in *Burnet v. Lynch*; and as to the right of action not passing to the assignees, rights of the same kind have been holden to pass under the old statute, the language of which is not so comprehensive as that of 6 G. 4. c. 16.

ALDERSON J. concurring, the rule was

Discharged.

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May 1.

PERRYMAN v. STEGGALL and STRAIGHT.

THIS was an action on a promissory note for 108*l.* given by the Defendants as sureties for one *Tucker* to *Sylvester* and *Walker*, and by *Sylvester* and *Walker* indorsed to the Plaintiff.

At the trial before *Gaselee J.*, *London* sittings in last *Hilary* term, the defence set up was, that the note was given as a security for money which *Tucker* had borrowed of *Sylvester* at a usurious rate of interest; and *Tucker*, against whom a commission of bankruptcy was still in force, and who, after his bankruptcy, had been discharged under the insolvent debtors' act, was called to prove the usury. The bankruptcy took place after the transaction with *Sylvester*. Whereupon it was objected, that *Tucker* was incompetent to give evidence, as the Defendants, his sureties, would be entitled to prove under his commission whatever they might be adjudged to pay in this action, the verdict in which would be evidence against him of the amount of damage sustained by the Defendants.

Upon this the Defendants executed the usual general release to *Tucker*, when it was further objected, that all *Tucker's* estate, being vested in his assigness, the release which had been executed operated only as a release of his person, and left his estate, which was vested in assignees, still liable to the Defendants' proof. The witness, however, was admitted, and a verdict was found for the Defendants; which

A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignees of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus.

Wilde Serjt. obtained a rule *nisi* to set aside, on the ground that *Tucker* was incompetent to give evidence, notwithstanding the above release.

Andrews

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Andrews Serjt., who shewed cause, after attempting, without success, to shew that *Tucker* was not connected with the Defendants, relied on the release as having restored his competency.

Wilde. The Defendants, in case of a verdict against them, would, notwithstanding their release to *Tucker*, be entitled to prove the amount under *Tucker's* commission, without disturbing the previous dividends, if any. 6 G. 4. c. 16. s. 52. The witness, therefore, was interested to defeat the verdict. The Defendants should have given to the assignees a separate release of all claim on the bankrupt's estate, and the bankrupt should have released his claim to a surplus. *Carter v. Abbott.* (a)

TINDAL C. J. It seems to me, that, under all the circumstances of the case, *Tucker* was not an admissible witness. He had been a bankrupt, and afterwards insolvent; and the proceedings under the commission of bankruptcy are not yet wound up. If the Defendants could prove under that commission for the amount of this verdict, the surplus and allowance to the bankrupt would be diminished in the same proportion. Now, the the fifty-second section of 6 G. 4. c. 16. enables them to prove for such a claim, without disturbing dividends already paid. If *Tucker* had released his right to the surplus, perhaps he might have been a competent witness as far as the bankruptcy is concerned. It is not necessary now to touch upon the insolvency; for, considering the witness incompetent in respect of the bankruptcy, we think the rule should be made

Absolute.

(a) 1 B. & C. 444.

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HARRISON v. WOOD.

May 1.

THE Plaintiff declared in *assumpsit* for salary due to him as the Defendant's travelling clerk, and for the amount of disbursements he had made for the Defendant.

At the trial before *Tindal* C. J. he proved that he had been introduced to the Defendant towards the end of *March* 1830; that the Defendant had then engaged him as travelling clerk at 100*l.* a year, the expense of his journeys to be defrayed by the Defendant; and that he, the Plaintiff, had disbursed 51*l.* 9*s.* 6*d.*, the expense of journeys performed between the 29th of *March* and 26th of *September* 1830.

A particular of demand is not to be construed so rigidly as to nonsuit a plaintiff for inaccuracies which could not mislead. Disbursements held recoverable under an item for "cash advanced."

The Plaintiff's particular of demand was as follows:—

<i>John Wood to B. Harrison.</i>		Dr.		
1830.		£	s.	d.
<i>March.</i>	Cash advanced between <i>March</i>			
	20th and <i>April</i> 1st	-	51	9 6
<i>March</i>	29th to <i>September</i> 26th. Salary at			
	100 <i>l.</i> per annum	-	58	0 0
			109	9 6
	By cash at sundry times, and payments			
	made by you for me	-	50	7 7
	Balance	-	59	1 11

On the part of the Defendant, it was objected that these disbursements could not be recovered under a particular claiming for cash advanced; and that the

50*l.* 7*s.* 7*d.*

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50*l.* 7*s.* 7*d.* for which the Defendant had credit, covered the real amount of salary due, which, at 100*l.* a year, was less than 50*l.* from *March* 29th to *September* 26th.

Whereupon the Plaintiff was nonsuited.

A rule *nisi* having been obtained for a new trial, on the ground that "cash advanced" ought to be deemed to include disbursements,

Jones Serjt., who shewed cause, relied on the objection taken at the trial, and also on the circumstance that the dates of the disbursements did not agree with those of the advances specified in the particular.

TINDAL C. J. If this had struck me at the trial as it does now, I should have reversed the situation of the parties. In both points, I think this particular ought to have the operation for which the Plaintiff contends. In the first place, we ought not to narrow the term "advances" so as to exclude disbursements; which, though not strictly, were in effect advances made to the Defendant, since he was under an engagement to defray the expense of the Plaintiff's journeys. Secondly, as to the mistake in point of dates, if it had been such as to occasion any doubt, we might have thought it right to hold the Plaintiff to the strict language of the particular; but, according to the evidence adduced at the trial, the Defendant must have been well aware that this was a mistake, and that *April* was written for *September*. The Plaintiff and Defendant were strangers to each other till the end of *March*, when the Plaintiff was introduced for the first time, and the agreement between the parties was entered into. Now, could it be supposed that any money had been advanced except under that agreement? We should pervert the intent of a bill of particulars, if we were to allow it thus to be
 the

the means of entrapping a plaintiff. The case falls within the decision in *Millwood v. Walter* (a), where it was holden that an erroneous date to a bill of particulars would not preclude the plaintiff's demand if the date could not mislead.

The sum for which the Plaintiff gives credit is only a conditional admission, of which the Defendant is not to take an unfair advantage.

PARK J. referred to *Day v. Bower* (b), where it was held that the plaintiff's particular is sufficient, however inaccurately drawn up, if it convey the requisite information to the plaintiff; and to *Davies v. Edwards*. (c) In *Wade v. Beasley* (d) the particular mentioned only a promissory note; and that being unstamped, the plaintiff was not allowed to prove the consideration, because such proof would interfere with the revenue laws.

GASELEE J., with respect to the Defendant's taking advantage of the sum for which the Plaintiff gave credit in his particular, referred to *Harrington v. Macmorris* (e), where it was held that a plaintiff could not use a notice and particular of set off for evidence of the debt on the issue of *non assumpsit*.

ALDERSON J. concurring, the rule was made

Absolute. (g)

(a) 2 Taunt. 224.

(b) 1 Campb. 68, 69. n.

(c) 3 M. & S. 380.

(d) 4 Rep. 7.

(e) 5 Taunt. 228.

(g) See *Lambirth v. Roff*,
post. 411.

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May 2.

WILSON v. COLLINS.

The payment of costs for not proceeding to trial is not a condition precedent to ulterior proceedings, unless so specified in the rule.

ANDREWS Serjt., on the part of the Defendant, had obtained a rule *nisi* to defer the trial of this cause, till certain interlocutory costs, awarded for not proceeding to trial on a former occasion, should have been paid.

Wilde Serjt., who shewed cause, contended, that though, under extraordinary circumstances, the Court might make the payment of such costs a condition precedent to ulterior proceedings, yet that such was not the ordinary practice, and that no circumstances had been disclosed to justify the application which had been made. The party might issue his attachment.

Andrews suggested, that the Plaintiff was out of the way, and could not be served. But

The Court thought it would occasion great inconvenience to make the payment of such costs a condition precedent in ordinary cases, and the rule was

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THE Plaintiff's attorney, in order to prevent the Defendant from entering up judgment of *non pros* for want of a declaration, which he was in a condition to do, obtained a rule to discontinue upon payment of costs, and gave notice of an appointment to tax the costs. This rule expired on the 6th of *February* 1832. But the Plaintiff, instead of paying the costs or entering a discontinuance, on the 7th served the Defendant with a declaration. The Defendant upon this entered up judgment of *non pros*, which

The Defendant being in a condition to enter judgment of *non pros* for want of a declaration, the Plaintiff, with a view to prevent the *non pros*, obtained a rule to discontinue on payment of costs; however, instead of paying costs or discontinuing, as soon as the rule had expired, he served the Defendant with a declaration: Held a fraud on the proceedings of the Court; and the Defendant having entered up judgment of *non pros*, the Court refused to set it aside.

Jones Serjt. obtained a rule *nisi* to set aside as irregular.

Wilde Serjt., who shewed cause, relied upon the appointment to tax costs, as being in itself a discontinuance, when

Jones, in support of his rule, referred to *Edington v. Bowdenham* (a), and urged that the rule to discontinue having been obtained subject to the condition precedent of paying costs, the Plaintiff was at liberty to renounce it if he rejected the condition. But

The Court, without deciding the question of law, held the conduct of the Plaintiff's attorney to be in the nature of a fraud upon the proceedings of the Court. Instead of making a direct application for time, he had taken out a rule which he had no intention to act upon, thereby

(a) 1 Dowl. Pr. Rep. 154.

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lulling the Defendant into security, and obtaining an advantage which might perhaps have been refused upon a direct application. They, therefore, ordered the rule to be discharged, giving the Plaintiff, however, an option to proceed upon payment of all costs incurred by the Defendant.

Rule discharged accordingly.

May 7.

WILLIS v. BERNARD.

In an action for criminal conversation, the letters of the wife to her husband and others are admissible in evidence to shew the state of the wife's feelings, although they may also state a fact which would not strictly be evidence.

THIS was an action for criminal conversation. At the trial before *Tindal* C. J., it appeared that the Plaintiff and his wife were residing in *Upper Canada* when the Plaintiff, being called by business to *England*, left his wife in the colony, but took his mother with him. By a cross examination of the witness who proved the above facts, the Defendant's counsel sought to insinuate that the Plaintiff and his wife were not on good terms with each other, and that she felt offended at being left in *Canada* alone. To counteract the possible effect of this insinuation, and to show the state of the wife's feelings towards her husband, the Plaintiff's counsel offered in evidence the following letter written by the wife to her husband's brother shortly after the husband sailed for *England*, and before her acquaintance with the Defendant had commenced.

" *York, U. C., July 25. 1828.*

" My dear Mr. Willis,

" I wrote yesterday to *John* in a packet that was sent over by the steam boat, in order to leave *New York*, if possible, by the *Pacific* the 1st of *August*, but I had not time to write to you by the same packet. I am truly glad

glad to hear that Mrs. *Willis* has derived benefit from change of scene and air. As this is a letter on business, I do not intend therefore to write on any other topic. I wrote a letter to Mr. *Whitton* by *John*, which I am most anxious should be delivered as soon as possible after his arrival in *England*, though I fear *John* will not do so, as he was quite averse to my writing it at all. Now, my dear Mr. *Willis*, it is absolutely necessary *John* should immediately settle all concerns with the Messrs. *Salt*, therefore I am exceedingly anxious that my trustees will transfer all or any part of the property now in the funds in my name, to the name of *John Walpole Willis*, to be applied to his use for the payment of any debts he may have incurred, so far as it will go. I need not say to you that *John's* desire is to add to any property his wife and child may have, instead of taking any part away; but the only way to increase his property is to be perfectly unembarrassed in pecuniary affairs. Should, however, the trustees be averse to transfer the stock to *John's* name, there is a plan which, as it more immediately concerns myself, I am determined to adopt, the more so as I should imagine the trustees could not offer any objection to it. As you are aware my husband settled on me, for my sole use, and during my life, any property I may or might have, I propose to do this, which cannot injure any one, but, on the contrary, will benefit us all. It is to sell my life interest in the sum of 5000*l.*, for which, as I am young (twenty-six in *August*, and I may say strong and healthy) I should get at least 1500*l.* or 2000*l.* more than the sum. I earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, the happiness or benefit of my husband, and I am sure none of us can be contented until we are quite out of

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debt. Should this plan, which is entirely my own, and which I am determined to pursue, succeed to my wishes, the money is to be immediately paid to *John* to pay off all debts, so far as it is sufficient to do so. I have considered this very frequently, and still it appears to me the best means to adopt, as, at my death, should *John* survive me, it will still be for him and my child, and it will afford me more real gratification than I can express. *John's* mind, as well as my own, will be relieved of a great annoyance, and then he will be better able to exercise his talents for the benefit of himself and family. It is little I can do, and he has sacrificed much for me; but what little I can, I ought and will do, as far as I can. I have to request another favour of you, not to mention this to *John* until you have well considered it yourself, and consulted those you think understand the subject, and who will give unbiassed advice. My husband would, I am aware, object to it; and indeed he ought not to be subjected to my trustees' denial; and I am anxious for you to explain to them that my husband is quite ignorant of my having written this letter, and therefore I am perfectly unbiassed by his opinion or advice on this subject. Should the trustees object to this plan, I shall consider of some other means of deriving benefit from money which is now almost thrown by, as the interest is surely far too little for 5000*l*. Excuse this troublesome office. Accept the united loves of all here, and give the same to all dear friends; and believe me to be, my dear Mr. *Willis*,

"Your's &c.,

"*Mary Isabella Willis.*"

The Defendant's counsel objected to the reception of the letter on two grounds: 1st, that it was addressed, not to the husband, but to a third person, and the decided cases had not gone further than to admit letters from

from the wife to her husband; 2dly, that the wife's letter contained evidence of a particular fact; namely, the wife's offer to transfer her property to her husband, whereas, if admissible at all, it could only be received as evidence of the general state of her feelings. *Trelawny v. Coleman* (a), *Edwards v. Crock*. (b) The Chief Justice received the letter, subject to a motion to this Court; but cautioned the jury to read it only as evidence of the state of the wife's feelings; and a verdict having been found for the Plaintiff with damages,

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Spankie Serjt. obtained a rule *nisi* for a new trial, on the ground that the above letter ought not to have been received in evidence.

Wilde Serjt. shewed cause. The admissibility of the evidence must be considered with reference to the point to be proved by the Plaintiff. The course of the cross-examination rendered it necessary for the Plaintiff to establish as a fact that his wife's feelings towards him were unaltered at the time her intimacy with the Defendant commenced. Now her declarations to that effect would clearly have been admissible evidence. If the declarations of the wife would be admissible, by the stronger reason are her letters, as being less open to misrepresentation. In *Trelawny v. Coleman*, letters written by the wife to the husband while living apart from each other, proved to have been written at the time they bore date, and when there was no reason to suspect collusion, were held to be admissible evidence. And in *Edwards v. Crock*, where the husband and wife necessarily, from their situations in life, lived separate, and the wife committed adultery, letters written by her to her husband during their separation, but before any suspicion of

(a) 1 B. & Ald. 90.

(b) 4 Esp. 39.

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misconduct in the wife, were held admissible evidence to shew that the husband and wife lived in a state of concubial affection previous to the adultery. It is immaterial whether the letters are written to the husband or to a third person. And as to their containing a statement of fact, a witness, on cross-examination at least, would be allowed to state a fact on which he formed his opinion as to the feelings of the wife. But the jury were cautioned not to receive the letter as evidence of the fact; and it is no objection to a writing put in to prove a particular fact that incidentally it also proves another. In *Manning v. Clement (a)*, where the plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade, by publishing that the bitters were made to adulterate porter, *per quod* the plaintiff was ruined, it was held, that under the general issue, the defendant might give in evidence that the plaintiff's trade was illegal, although, in doing this, it also appeared that his bitters had been condemned in the Court of Exchequer, and that the libel was true.

Spankie and Storks Serjts. contra. In *Trelawny v. Coleman* and *Edwards v. Crock* the evidence was admitted on the ground of necessity, because the wife lived apart, and there were no other means of shewing what were her feelings towards the husband. In the present case, that proof might have been furnished by persons in whose society they had lived. Besides, this is not a letter to the husband, and a letter to a third person may be written for a purpose. At all events, the letter, as containing the statement of a fact, the surrender of property, which the jury ought not to have taken into consideration, should have been withheld from their perusal. [*Alderson J.* That fact was of itself in-

(a) 7 Bingh. 362.

dicative of the wife's feelings. Suppose the case of *Madame Lavolette*; would her conduct in rescuing her husband from prison, have been inadmissible as evidence of her feelings towards him?] That is a strong case; but, on principle, the evidence of the particular fact ought to be rejected; for her conduct may have been occasioned by motives other than those of regard for her husband. *Voltaire*, no mean authority for the springs of human action, describes a lady as earnestly and successfully importuning a minister for the promotion of her husband, although her attentions were by no means confined to him alone. (a)

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TINDAL C. J. It seems to me that this letter was admissible for the purpose, and to the extent to which it has been admitted. It appearing on the trial, that the Plaintiff being called to *England* on business, had sailed accompanied by his mother, and leaving his wife in *Canada*, the Defendant's counsel entered on a course of cross-examination, intimating that the parties had not lived on good terms, and that the wife was offended at not being allowed to accompany her husband to *England*. Under these circumstances, the purpose for which the letter was offered, was to shew that the wife retained her affection for her husband, and that she was not dissatisfied at being left in *Canada*. Two objections were made to the reception of the letter: one, that the Court was called on to extend the decisions in favour of the admissibility of such evidence, by reading a letter from the wife to a third person; the other, that the letter contained, in addition to expressions of affection, a statement of facts which could not properly be submitted to the jury. As to the first objection, the question on which the letter was submitted to the jury, was, what

(a) *Le Monde comme il va. Vision de Babouc, circa finem.*

were

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were the feelings of the wife towards her husband at the time it was written, and whether her affections had been alienated by her husband's departure. If a person had been present when the letter was written, and had heard her make declarations that she remained freely and voluntarily in *Canada*, and without offence conceived against her husband, such declarations would have been evidence of that fact. If such declarations made by the wife in conversation, *ore tenus*, would be evidence, a letter written by her to the same effect seems less open to objection, as being less liable to misrepresentation: and I can see no material difference between a letter addressed to the husband, and a letter addressed to a third person; of the two, it may be thought the more unexceptionable evidence, exempt from any imputation of collusion; we cannot, therefore, be considered to carry the principle farther, by admitting the wife's letter to a third person. The second objection is, that the letter contains statements of fact which could not with propriety be submitted as evidence to a jury, and might improperly influence their judgment. I admit that the letter does contain statements of fact, and if it had been used as evidence of those facts, there ought to be a new trial. But it was produced for the purpose of shewing the state of the wife's feelings; the jury were cautioned that it was not to be taken as evidence of the facts, and it contains passages abundantly sufficient to shew the general good feeling of the wife. "I wrote yesterday to *John* in a packet that was sent over by the steam-boat, in order to leave *New York*, if possible, by the *Pacific* the 1st of *August*, but I had not time to write to you by the same parcel." And in the body of the letter she says, "I earnestly entreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, the

the happiness or benefit of my husband." Surely as a declaration of the wife's feelings, this was not to be excluded. No doubt it renders the administration of justice more difficult when evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence. The rule for a new trial, therefore, must be discharged.

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PARK J. I do not agree with the counsel for the Defendant that nothing in this cause called for the introduction of the letter. When it had been insinuated in cross-examination that the Plaintiff had left his wife in *Canada* against her will, and that they were an unhappy couple, sufficient grounds existed to call for the introduction of such evidence; and it was most important to produce this letter, written before the wife's acquaintance with the Defendant commenced, and therefore clear of any imputation of collusion. The case falls exactly within the principle laid down in *Trelawny v. Coleman*, where letters from a wife to her husband were received in evidence; and letters from a wife to a third person are less open to exception. In *Edwards v. Crook* also Lord *Kenyon* was clearly of opinion that the wife's letters were admissible in evidence. It has been argued that in those cases the letters were received on the principle of necessity, because no other evidence could be adduced of the feeling between the parties. But the letter was equally necessary here; for the husband being beyond the sea, the wife's demeanour could not otherwise be shewn at the period immediately before her acquaintance with the Defendant. The letter, independently of the facts as to the settlement, contains a most delicate and feeling expression of conjugal affection, — " I earnestly

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earnestly intreat you to forward this plan as much as you can, and thus procure me one of the greatest pleasures the money could ever afford me, of being able to forward in any degree, however trifling, the happiness or benefit of my husband." If she had come to *England*, and had said this to Mr. *Willis*, would not such expressions have been evidence to shew the state of her affections? I agree that it is more desirable that such part of the evidence as does not apply to the point to be proved should be withdrawn altogether from the consideration of the jury. But in many cases that is impossible; as in *Manning v. Clement*, where the plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade by publishing that the bitters were made to adulterate porter, *per quod* the plaintiff was ruined; it was held, that, under the general issue, the defendant might give in evidence that the plaintiff's trade was illegal, although in doing this it also appeared that his bitters had been condemned in the Court of Exchequer, and that the libel was true. So in the case of prisoners; where confessions are given in evidence which unavoidably involve the mention of others besides the party confessing. But the jury are always cautioned to exclude the statement as against any but the party confessing. They also received a proper caution in this case, and, subject to that, the letter was properly admitted.

GASELEE J. I am of the same opinion. I can make no distinction between a letter to a third person, and an oral declaration of the wife, which is clearly evidence according to the decision in *Trelawny v. Coleman*. The date of this letter shews that it was written after the departure of the husband, and before the wife became acquainted with the Defendant; it is, therefore, most important

important as shewing the state of the wife's feelings at a very critical period. I think that both the objections have been answered, and that the rule must be discharged.

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ALDERSON J. This case cannot be distinguished in principle from *Trelawny v. Coleman*. An objection which was made in that case, that no evidence was given to shew why the husband was absent from his wife, has been answered in this, by shewing that the husband was called to *England* on business; but it was admitted in *Trelawny v. Coleman*, that the declarations of the wife were admissible as forming the ground of a witness' opinion as to the state of her affections. If so, why should not letters from the wife to a third person be received, especially when letters from her to her husband have been received on the same principle as conversations between them? If what the wife says is admissible to shew the way of life between her and her husband, what she writes must be equally admissible. Undoubtedly, the letter in question contains the statement of a fact which might have weight with the jury, and was not, strictly speaking, evidence. But the jury were properly cautioned on the subject, and as reasonable men, they must, after such caution, be supposed capable of rejecting what was not applicable to the question in issue. That circumstance, therefore, is no objection to the reception of the letter, and the rule which has been obtained for a new trial must be

Discharged.

1832.

May 3.

DOE dem. REW and Others v. LUCRAFT.

"My house in A. to such son of mine as shall first attain twenty-one years, when he shall attain such age, and his heirs; but in case I depart this life without leaving a son, or leaving such, none shall attain twenty-one, to my daughter Jane, if she shall attain twenty-one, and her heirs; but should I depart this life without leaving issue, to L. and his heirs."

Testator left one child, his daughter Jane, who died without issue under the age of twenty-one:

Held, that L. took nothing by the devise to him.

THE lessors of the Plaintiff sued, as the acting devisees in fee, in trust for sale under the will of *James Newton* of *London*, wine-merchant, deceased, heir of *John Newton* of *Broadclyst*, in the county of *Devon*, gent., deceased, to recover possession of one undivided moiety of a freehold messuage, with the appurtenances, situate in *Aldgate High Street*, which the Defendant *Nicholas Lucraft* claimed to hold to him and his heirs under the will of *John Newton*.

Upon the trial at the *London* sittings last *Michaelmas* term, a verdict was found, by consent, for the Plaintiff, subject to the opinion of the Court on the following case:—

Henry Newton of *Aldgate High Street*, *London*, wine-merchant, being seised in fee-simple of the entirety of the freehold property in question, by his will, dated 4th of *August* 1803, devised the same to his brother *James Newton* and his assigns for life, with remainder to trustees to preserve contingent remainders; with remainder to the testator's nephew *Henry Newton*, son of the testator's eldest brother, *John Newton*, for his life; with remainder to trustees to preserve contingent remainders; with remainders in strict settlement to the issue of said *Henry Newton*, the nephew; with remainder to the testator, *Henry Newton's*, own right heirs for ever.

The testator *Henry Newton*, died on the 27th of *November* 1819, without issue, leaving said *John Newton*, his eldest brother and heir at law, and said *James Newton*, his only other brother, him surviving. His will was proved in the prerogative court of *Canterbury* 11th of

of January 1820. *Henry Newton*, son of *John Newton*, died without issue in the lifetime of the testator. The said *John Newton*, by his will dated 29th of October 1822, duly executed and attested to pass freehold estates, devised as follows: — “ I give and devise all that my reversion in fee expectant upon the life estate of my brother *James*, of and in all that messuage or tenement and premises, formerly two messuages or tenements, situate in *Aldgate High Street*, now in the occupation of my said brother, unto *Arthur Clarke* and *Mark Ashford* and their heirs; in trust nevertheless as to one undivided moiety or half part thereof for *Nicholas Lucraft*, his heirs and assigns for ever: and as to the other undivided moiety or half part thereof, in trust for such son of mine by my present wife issuing as shall first attain the age of twenty-one years, as and when such son shall attain such age, and for his heirs and assigns for ever. But in case I shall depart this life without leaving a son, or, leaving such, none shall live to attain the age of twenty-one years, then, as to the said last-mentioned moiety or half part, in trust for my daughter *Jane Newton*, if she shall live to attain the age of twenty-one years, and for her heirs and assigns for ever. But in case my said daughter *Jane Newton* shall depart this life under that age, then I give and devise the said last-mentioned moiety or half part unto the said *Arthur Clarke* and *Mark Ashford* and their heirs, in trust for such other my daughter by my present wife as shall first live to attain the age of twenty-one years, and for her heirs and assigns for ever. But should I depart this life without leaving issue, then I give and devise the entirety of the said messuage or tenements and hereditaments, situate in *Aldgate* aforesaid, unto the said *Arthur Clarke* and *Mark Ashford* and their heirs, in trust for the said *Nicholas Lucraft*, his heirs and assigns for ever.”

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The said *Nicholas Lucraft* was *John Newton's* wife's brother; and at the time of the making the will of *John Newton*, *James Newton* was not nor had ever been married, and was of the age of sixty-five years and upwards.

John Newton died in or about the month of *March* 1824, in the lifetime of *James Newton*, leaving *Jane Newton*, his only child, and without having revoked or altered his will; and the same afterwards was duly proved.

The said *Jane Newton* died in *October* 1826, an infant, at the age of four years or thereabout, leaving *James Newton*, her uncle, her heir at law, her surviving.

James Newton, by his will dated 22d of *April* 1823, duly executed and attested to pass freehold estates, after bequeathing certain pecuniary legacies, as to all the rest, residue, and remainder of his estate and effects, of what nature or kind soever and wheresoever, that he should be possessed of, interested in, or entitled to at the time of his decease, and not thereinbefore disposed of, gave, devised and bequeathed the same and every part thereof to his trustees and executors, the lessors of the Plaintiff, to hold to them, their heirs, executors, and administrators, upon the trusts therein mentioned, and appointed them executors of his said will. The testator republished his will on the 21st of *July* 1827; died in *October* 1830; and the lessors of the Plaintiff proved the will.

It was agreed that either party should be at liberty, upon the argument of the case, to refer to any part of the said will of *John Newton*.

The question for the opinion of the Court was, whether the Defendant *Nicholas Lucraft* took any and what estate in the moiety of the freehold premises in question under the ultimate devise contained in the said will of *John Newton*.

Scriven

Scriven Serjt. for the lessor of the Plaintiff.

The event upon which the entirety of the premises in *Aldgate* was to go over to *Lucraft* under the will of *John Newton* never took place; for he died, leaving issue; and if the fact had been otherwise, the devise of the entirety to *Lucraft* would have been void as too remote after a general failure of issue. *Forth v. Chapman* (a), *Beauclerc v. Dormer* (b), *Barlow v. Salter* (c), *Franklin v. Lay*. (d)

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Stephen Serjt. for the Defendant. The devise over, upon the testator's dying without leaving issue, means such issue as were the objects of the preceding devise, that is, such issue as should live to attain twenty-one years; and the will must, therefore, be read as if it had been written, "without leaving *such* issue as *aforesaid*." There is abundant authority for putting that construction on the words "dying without leaving issue," when employed after previous devises to children. *Blackborn v. Edgley* (e), *Morse v. Marchioness of Ormond* (g), *Ginger v. White* (h), *Target v. Gaunt* (i), *Farthing v. Allen* (k), *Gulliver v. Wickett* (l), *Fonnereau v. Fonnereau*. (m) No doubt the devise over, in case of dying without leaving issue, would be void, if the Court could not imply an estate tail in the first takers; but that, according to *Tenny v. Agar* (n) and numerous other cases, may properly be implied.

TINDAL C. J. It seems to me that, on the proper construction of this will, our judgment ought to be for the Plaintiff. The question arises on the

- (a) 1 P. Wms. 663.
- (b) 2 Atk. 308.
- (c) 17 Ves. 482.
- (d) 6 Madd. 258.
- (e) 1 P. Wms. 600.
- (g) 3 Madd. 99.

- (b) *Willis*, 348.
- (i) 1 P. Wms. 432.
- (k) 2 Madd. 310.
- (l) 1 Wils. 105.
- (m) 3 Atk. 315.
- (n) 12 East, 253.

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words of a will, by which the testator, *John Newton*, devises to *Nicholas Lucraft* certain messuages, with the appurtenances, in *Aldgate High Street*; and the words are, "should I depart this life without leaving issue, then I give and devise the entirety of the said messuage or tenements and hereditaments situate in *Aldgate* aforesaid unto *Arthur Clarke* and *Mark Ashford*, and their heirs, in trust for the said *Nicholas Lucraft*, his heirs and assigns for ever." Now these words may be taken according to their natural meaning, and then they imply a devise over after a general failure of issue which would be void, as too remote: or they may be taken to mean a dying without leaving a child or children; in which case the event on which the devise over is to depend will not have happened; for the testator died, leaving a daughter. But, on the part of the Defendant, a third construction has been contended for, namely, that we should take the will as if it had been written "Should I depart this life without leaving *such* issue as *aforesaid*;" and that this is to mean, not only such issue as had been before described, namely, a son and daughter, but such issue, with the restrictions which accompanied the mention of them in the preceding devise. But, though cases have been cited to shew that the word *issue* may be applied to such issue as have been described before, there is no case to shew that when used in such sense it is also to include the restrictions which may have accompanied the mention of such issue in preceding parts of the will. Supposing the testator here to have meant, by *dying without leaving issue*, dying without leaving a son or daughter, what is there to shew he meant to restrict that to a dying without leaving a son or daughter *who should have attained the age of twenty-one years*? If we were to import such a restriction into this part of the will, we should manifestly do violence to the intention of the testator expressed in another part.

Where

Where the testator disposes of the same property to a daughter in remainder after a son, he uses those words of restriction: when we see, therefore, that he has omitted them when he devises the same property to the Defendant, we must infer that the omission was intentional, and that we should improperly interfere if we interpolated words from another portion of the will. As to our implying an estate tail, to prevent the devise over from being too remote, in case we adopt the construction contended for on the part of the Defendant, there is an end of that argument, if by *such issue* we are to understand son or daughter. And it is not easy to see to whom the estate is to go over. The proposition, therefore, for which the Defendant contends, not being satisfactorily established, I can only give the words their natural effect, that the estate is only to go over if the testator should die without leaving issue; and as that has not happened, our judgment must be for the Plaintiff.

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PARK J. I am of the same opinion. When we see words of restriction applied in the devise to the daughter, and omitted in the devise to the Defendant, we must suppose this was done advisedly, and the rather, as the testator appears by the will to have had professional assistance.

GASELEE J. concurred.

ALDERSON J. I am of the same opinion. The word *issue* may sometimes be restrained to a particular class; but it is required here to add the further restriction, that that class should not have attained the age of twenty-one. No case will be found to have gone that length.

Judgment for the Plaintiff.

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May 9.

TEMPERLEY v. SCOTT.

Costs. A captain of a ship, witness in a cause, is allowed for his subsistence according to his station, for the whole time during which he is detained to give evidence.

IN March 1831, the Plaintiff's agent proposed that a witness in this cause, *Grewcock*, the captain of a ship, should be examined on interrogatories, apprising the Defendant that the witness could not be detained except at a considerable expense; the Defendant's agent, however, said he would rather incur the risk of expense than forego the advantage of cross-examining the witness in open court.

The trial of the cause, which was twice postponed at the instance of the Defendant, took place in *February* last, when a verdict having been found for the plaintiff, the prothonotary allowed the witness, *Grewcock*, 8*l.* a month for his subsistence and loss of time during eleven months, upon affidavits that he had been detained during that time, had lost an opportunity of profitable employment, and had been paid 10*l.* a month by the Plaintiff.

Wilde Serjt. having obtained a rule *nisi* for the prothonotary to review his taxation on the ground that the allowance for loss of time was improper,

Taddy Serjt., who shewed cause, relied on *Berry v. Pratt* (a), where costs were allowed for the subsistence of a seafaring man during the period of his detention in order to give evidence; and on *Loneragan v. Royal Exchange Assurance* (b), where the captain of a ship was paid for his loss of time.

Wilde. The allowance in *Loneragan v. Royal Exchange Assurance* was for subsistence. No *English* wit-

(a) 1 B. & C. 276.

(b) 7 Bingh. 725, 729.

ness is entitled to any allowance for loss of time; a promise to pay him is void; *Collins v. Godefroy* (a); and it is doubtful, whether the allowance of subsistence to an *English* witness can be supported on principle. Every man is bound to give his attendance in a court of justice; it may have a dangerous effect on his testimony to allow him to be supported at the expense of the party who calls him, and will enable that party to entail overwhelming expense on his opponent.

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TINDAL C. J. It is unnecessary in this case to agitate the general principle as to the allowance of costs for loss of time; for, in the first place, the sum which has been allowed in this case for subsistence is not extravagant; — very little, if it all, more than was necessary for the board and lodging of a witness in *Greuxcock's* station; — and then an offer was made to the adverse party to examine the witness on interrogatories, and warning was given of the expense that would attend his refusal. Perhaps he made a prudent election; but it reduces the case to a bargain between the two parties, which precludes the necessity of any interference on the part of the Court.

Rule discharged.

(a) 1 B. & Adol, 950.

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CRISP v. SIR HENRY EDWARD BUNBURY, Baronet,
and Others.

Since 9 G. 4. c. 92. an action does not lie against the trustee of a benefit society. In case of disputes, the only mode of proceeding is by arbitration.

THIS was an action of *assumpsit* against the Defendants, as trustees of the *Mildenhall* bank for savings, for money had and received by them to the use of the Plaintiff. At the trial before *Tindal C. J.*, *Middlesex* sittings 1830, a verdict was found for the Plaintiff for 44*l.*, subject to the opinion of the Court on the following case: —

In *April* 1818 a savings bank was established at *Mildenhall*, in the county of *Suffolk*, under the provisions of 57 G. 3. c. 130. Rules were drawn up which, in the same year, were duly enrolled with the clerk of the peace, and afterwards acted upon. The Defendants, with others since dead, were duly appointed trustees, and acted as such; but *William Newton*, who is still living, though not made a Defendant, was also a trustee, and acted. Sir *Henry Edward Bunbury*, one of the Defendants, who resided at *Mildenhall*, was also duly appointed, and acted as treasurer, and *W. Bassett* another of the Defendants, as manager. One *William Gill* was duly appointed clerk in the year 1818, and continued to act in that capacity until 1825, when it was discovered that he had embezzled a considerable sum of money, the amount of deposits which had been received by him. He absconded, and was prosecuted by the trustees to conviction, and transported. *Bassett* from time to time received deposits of the Plaintiff, and duly signed his book in which such deposits were regularly entered, but he never saw *Crisp's* account in the possession of the clerk, or attended at the clerk's office after *March* 1819; the clerk having told him that he

would

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would give him notice when it was necessary for him to attend. On *Gill's* absconding, *Bassett* went to his house, and there found two cash account books, one a false and the other a true one; in each of which the Plaintiff's account with the bank was entered, from which it appeared, that on the balance in the hands of the clerk, the Plaintiff's claim in *June 1824* was *35l. 8s. 3½d.* The entry of the account in both books was precisely similar, except that in the false book the word "paid" was added at the end of the account, importing that the whole balance had been paid to the depositor. It was admitted that the receipts and payments on account of deposits were as appeared by the account; and that the Plaintiff had not received the balance of the account. A letter was, on the 27th of *June 1829*, sent by the Plaintiff's attorney to the Defendants, to *W. Newton*, and various others, which, after alluding to the embezzlement and conviction of the clerk, and expressing a hope that an amicable adjustment of the claims of the several depositors might be effected, gave notice to the Defendants and others, that the Plaintiff had appointed *Mr. C. Austin*, of the *Temple*, barrister, to be his referee, and called on the Defendants, within a month to appoint a referee on their behalf, both in the matter of *Crisp*, and the other depositors. *Sir H. Bunbury* was then abroad, and did not return to *England* till after the action was brought. No arbitrator had ever been appointed by the managers or trustees, they altogether denying their liability, and it being admitted that they had no funds in hand to satisfy the Plaintiff's claim. It was admitted that general meetings to receive the reports, and to examine and audit all the accounts of the establishment, were not held pursuant to the first rule of the institution. The Plaintiff went, about the time *Gill* absconded, to his house, for the purpose of making a formal demand, but

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he found the premises shut up, and that *Gill* had absconded.

Among the rules of the society were the following: First, "The affairs of the bank shall be conducted by not less than six trustees, twenty managers, and a treasurer; none of whom shall derive any benefit from the deposits, or receive any remuneration for services. Every trustee will be considered as an honorary manager. General meetings shall be held on the first *Friday* in *October, January, April, and July*, to receive the reports, and to examine and audit all accounts of the establishment. The managers shall also have the power of filling up vacancies, and of adding to the numbers of trustees, and of their own body. Upon the requisition of three managers, a special meeting may be called, upon giving fourteen days' previous notice. At every general meeting, one trustee and four managers shall be competent to act." Seventeenth; "Any matter in dispute between this institution and any person acting under the same, and any depositor therein, or any executor, administrator, or next of kin of any deceased depositor, or any person claiming to be such executor, administrator, or next of kin, shall be referred to the arbitration of two persons; one to be named by the managers, and the other by the claimant: and in case the two persons so named shall not agree, they shall forthwith nominate an umpire, and the decision and award of such referees and umpire shall be final and binding upon both parties." And by 9 G. 4. c. 92. s. 45. it is enacted, "That in case any dispute shall arise between any such institution or any person or persons acting under them, or any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the bar-
rister

rister at law to be appointed by the commissioners, as directed by the act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal."

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The case was argued in *Hilary* term by

Storks Serjt. for the Plaintiff, and *Taddy* Serjt. for the Defendants, who took several objections to the Plaintiff's recovery; in particular, that the Defendants, as honorary trustees, were not responsible for embezzlement by the clerk of the society; and that, at all events, the Plaintiff's remedy was not by action, but by arbitration. The decision of the Court turns on the latter ground alone; as to which, it was contended on the part of the Plaintiff, that the statute 9 G. 4. c. 92. s. 45. is directory only with respect to arbitration, not imperative; that parties cannot, by agreement, oust the courts of law of their jurisdiction; nor can a statute effect this, except by express words or necessary implication; *Cates v. Knight* (a); and that, at all events, the Defendants having refused to proceed to arbitration, could not now object that the Plaintiff had proceeded at law.

On the part of the Defendants it was argued, that though parties cannot, by agreement, oust the jurisdiction of the courts of law, it may be ousted by statute; and that the statute 9 G. 4. c. 92. s. 45. is imperative in this respect, the object of the legislature being to protect the funds of poor contributors from more expensive litigation.

Cur. adv. vult.

TINDAL C. J. This is an action of *assumpsit* against the Defendants, as trustees of the *Mildenhall* bank for

(a) 3 T. R. 442.

savings,

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savings, and is brought for money had and received by them to the use of the Plaintiff. This bank was established in the year 1818, under the rules and regulations set out in the case; and from that time, until the passing of the statute 9 G. 4. c. 92., was governed by the various provisions contained in the statute 57 G. 3. c. 130. But that statute, with certain other acts which had been passed for amending it, were repealed by the 9 G. 4. c. 92., with an exception, that nothing in that act contained should invalidate or annul any payments, agreements, or appointments made, or proceedings had, or any instruments executed under the authority of any of the repealed acts; and by the last section of the 9 G. 4., that statute is declared to extend "to all savings banks established, and hereafter to be established, in *England* and *Ireland*." It appears, therefore, to us, that the only law which governed and regulated the rights of the parties to this action at the time the action was brought, is to be derived from the only statute then in existence in relation to the subject-matter of the action, namely, the 9 G. 4.

Amongst the objections that have been urged by the Defendants against the right to maintain this action, one is, that by the forty-fifth section of the last statute, the legislature has provided, "That in case any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons, to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the barrister at law to be appointed by the commissioners, as directed by the act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal:" and it is
 contended,

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contended, on the part of the Defendants, that this enactment is imperative upon the Plaintiff, taking away the jurisdiction of the courts of common law, and leaving the party who complains no other mode of determining his claim than that which is pointed out and provided by the act. It is not denied, on the part of the Plaintiff, that the present case falls within the description of those contained in the forty-fifth section; indeed, it would be impossible to argue that the present is not a dispute between persons acting under the institution and an individual depositor: but it is contended by the Plaintiff, that the jurisdiction of the courts of common law is not ousted by any words to be found in this section; and that the utmost which the section contemplates is, to create a concurrent, and not an exclusive jurisdiction in the arbitrators or barrister. But we are of opinion, that both with reference to the words of the statute, and the object which it had in view, the Plaintiff is barred from maintaining the present action in a court of law, and must pursue the remedy provided by the statute. It is undoubtedly true, that the jurisdiction of the superior courts of *Westminster* is not to be ousted, except by express words, or by necessary implication: *Cates v. Knight*: yet, where the object and intent of the statute manifestly requires it, words that appear to be *permissive* only, shall be construed as *obligatory*, and shall have the effect of ousting the courts of their jurisdiction, as in the case last referred to, where a clause enacted that it “shall and *may be lawful* for a justice of peace to hear and determine offences against the act that subject the offender to penalties, not amounting to 50*l.*,” with a power to the justices to mitigate the penalties; whilst the same act directed that all penalties which amount to 50*l.*, or more, *shall* be sued for in his Majesty’s courts at *Westminster*; it was held, that by necessary implication the courts above were ousted of their

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their jurisdiction in the case of penalties not amounting to 50*l*. Now, in this case the legislature has enacted that disputes of the description of the present "*shall* be referred,"— words which, in their natural force, denote an obligation, not a permission only; and unless these words are construed to be compulsory on the Plaintiff, they mean nothing. If they are not compulsory on the Plaintiff, neither can they be so, upon any principle of fair construction, upon the Defendant. And if recourse to arbitration is not intended except both parties choose to adopt it, then indeed the act is made a dead letter; for it would be competent for both parties to refer the dispute to arbitration, if they both agreed upon it, without the intervention of the statute. In order, therefore, to give these words of the statute any force or operation, the word *shall* must be construed as obligatory, that is, that the matter in dispute shall of necessity be referred to arbitration, and not be determined in any of the courts of *Westminster Hall*. But looking at the object and intention of the legislature, we think it clear that the remedy by action is taken away, and that by arbitration substituted in its place. These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profits by the addition of interest. On the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees, upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be, in effect, to cause the ruin both of the depositors and the institution, by casting the costs of an action in the superior courts at *Westminster* upon the losing party. No person would fill the gratuitous office of a trustee or a manager, if he

was

was exposed to the hazard of suits at law at once so expensive and so numerous; no depositor would be able to enforce his just rights, if he must sue in the superior courts, at the hazard of being defeated with heavy costs if he sued more of the trustees than he might be able to prove liable; or subject to have his suit abated if he sued too few. It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a reference in the mode pointed out in the act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should defeat that very serviceable object, — serviceable alike to the depositors and to the institution, — unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior courts.

In this view of the case, it would be improper to give an opinion on the other points which were made in argument, as we have no jurisdiction: and we can only express our surprise and regret that the Defendants, who set up this as a ground of defence, did not act upon it when the Plaintiff appointed an arbitrator on his part. At present, however, there must be judgment for the Defendants.

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(IN THE COURT OF CHANCERY.)

May 10.

Ex parte TINDAL.

By marriage settlement, *S.* covenanted to cause 4000*l.* to be paid to his wife's trustees within twelve months after his own decease, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but if they had no children to the survivor of them, *S.* and his wife, his or her executors or administrators.

Held, that this was a debt on a contingency, proveable under a commission of bankrupt against *S.*

EDWARD GRAY, upon the marriage of his daughter with *William Smith*, covenanted in her marriage settlement to pay *Smith* 2300*l.* immediately, for his absolute benefit, and 4000*l.* more within twelve months after *Gray's* decease. The 2300*l.* was accordingly paid on the marriage, and the 4000*l.* shortly after *Gray's* decease.

Smith, on his part, covenanted to secure his wife 80*l.* a year for her separate use, and, within twelve months after his decease, to cause to be paid 4000*l.* to her trustees, with interest from the time of his death, in trust to pay the interest and annual produce to his wife for her life in case she survived him; and after her death, in trust to pay and assign the money and the interest, and annual produce thereof to, between, and amongst the child and children of *Smith* and his wife, in manner thereafter mentioned; and if they had no child or children, to the survivor of them the said *Smith* and his wife, his or her executors, administrators, or assigns. The provision made for the wife was to be in lieu of dower.

Smith having become bankrupt, and his wife being still alive, *Tindal*, the trustee under her marriage settlement, applied to prove the value of the 4000*l.* covenanted to be paid by the executors of *Smith* within twelve months after his death, under 6 G. 4. c. 16. s. 56., which enacts, that "If any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing

issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not have been so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive a dividend with the other creditors, not disturbing any former dividends."

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The proof was rejected by the commissioners, but their decision was reversed by his Honor the Vice-Chancellor. (a) The decision of his Honor was afterwards reversed by Lord *Lyndhurst*. (b)

This was a petition to Lord *Brougham* C. to rehear the order made by Lord *Lyndhurst*, and was argued before the Lord Chancellor, assisted by *Tindal* C. J. and *Littledale* J. on the 27th of August 1831. (c)

TINDAL C. J. now delivered his opinion as follows, in which LITLEDALE J. and Lord BROUGHAM C. concurred: —

There are two questions in this case: *First*, whether the bankrupt has contracted a debt payable on a contingency within the meaning of the fifty-sixth section of 6 G. 4. c. 16.; and, *secondly*, supposing that he has done so, whether the commissioners can set a value upon the debt so as to make it the subject of proof under the commission.

On the first question it is contended, on the behalf of

(a) See 1 *Mont. & Mac.* 415.

(b) 1 *Mont. & Mac.* 422.

(c) For the argument see 1 *Mont. & B.* 375.

the

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the assignees, that the contract entered into by the bankrupt is not a debt, but merely a covenant that the executors of the bankrupt shall pay a sum of money on a collateral event; that the only effect of that contract is, to create a charge on his assets; and that such was all that the parties themselves contemplated by the settlement, as the bankrupt himself could never have been liable to pay the money: that the parties themselves took the chance of what the assets might produce, —a chance which, in some cases, might be more beneficial to the wife and children; because, if the husband should become bankrupt, and afterwards acquire property, they would have the benefit of the provision in full, instead of a dividend, very much diminished as it must be by the calculation of the contingency.— But we are of opinion that the contract contained in the settlement is a debt which the bankrupt has contracted within the meaning of the fifty-sixth section of the bankrupt act. A covenant to pay a sum of money constitutes a debt; and an action of debt, technically so called, may be maintained upon it: 1 *Leonard*, 208., *Com. Dig. tit. Debt* (A 4.), *Ingledeu v. Cripps* (a): for though in the case last cited there was a penalty, yet the language of the Court is, that debt will lie on a covenant to pay a sum of money; and it is a common practice to draw declarations in debt on a covenant to pay a sum of money. And if a man covenants that his executors shall pay a sum of money after his death, that also appears to us to create a debt, and we think it just as much so as if he himself had covenanted to pay it. *Plumer v. Marchant*. (b) In that case the testator covenanted that he would leave by his will, or that his executors or administrators should, within six months after his death, pay a sum of money

(a) 2 *Ld. Raym.* 814.(b) 3 *Burr.* 1380.

to trustees for the benefit of his wife and children; and an action being brought against the administrator on a bond of the testator, he pleaded *plene administravit*: the question was, whether he could retain the money so covenanted to be paid; and all the Court held that this was a *debt* which might be retained. It is true, there was a *penalty* on which debt would lie, but the Court only noticed that incidentally, and it is plain that their judgment would have been the same if there had been no penalty.

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There may be a doubt whether an action of debt, technically so called, would lie against executors upon such a covenant, because debt would not have lain against the testator himself: *Wentworth's Office of Executors*, 232., and *Perratt v. Austin* (a): though Lord Mansfield, in *Plumer v. Marchant*, above cited, speaks very lightly of the latter case of *Perratt v. Austin*, and even in the case itself, there is a note at the end making a *quære* to one of the reasons. But those authorities are merely to the form of action, whether it should be debt or covenant, and do not affect the substance of the case, which is, whether a sum of money is payable by the contract; and in the case referred to in *Leonard's* reports, it is said that the word *covenant* sometimes sounds in covenant, sometimes in contract, according to the subject-matter. The case of *Lee v. Cox and d'Aranda* (b) was cited, to shew that a covenant that a man's executors should pay, was the same as a covenant to leave a sum of money, and that the latter did not create a debt; but without considering whether at law at least, a covenant that a man's executors shall pay, be for all purposes the same thing as a covenant that he will leave, the case of *Lee v. Cox and d'Aranda* was upon a question, whether a widow should have the benefit of such a covenant, and

(a) *Cro. Eliz.* 232.

(b) 1 *Ves. I.* and 3 *Atk.* 419.

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also of the distributive share, *pro tanto*, of her husband's estate; a question on the point of double satisfaction. Many similar cases have occurred, all of which were considered in *Goldsmid v. Goldsmid*. (a) But we do not form our opinion upon the technical ground that an action of debt will lie in point of form, but upon the substance and effect of an absolute covenant, that a man's executors shall pay a sum of money to certain persons upon certain trusts, which, in our opinion, constitutes a debt.

Then, if it be a debt contracted, there is no doubt but it is payable on a contingency. There is one contingency as to the distance of time at which it is payable, depending upon the life of the bankrupt; and another, whether the wife or any of the children be alive at the death of the bankrupt, so as to be entitled to the benefit of it. It is possible, that the contingency as to who shall have the benefit of it, may never happen at all, which would be the case if the wife should be dead, and there should be no children at the death of the bankrupt. But it has been urged, that this is not a contingent debt within the meaning of the act of parliament, because it is uncertain whether the debt will ever be payable or not. We think, however, that uncertainty affords no reason why it should not: neither the words nor the spirit of the act require such a restriction upon contingent debts. It surely would put too narrow a construction upon the words of this act, to hold that they are to be confined to cases where the event upon which the contingency rests must happen some time or other; and that because such event may never happen, the debt is not to be taken as payable on a contingency; for though the debt may never *be* paid, it is nevertheless *payable* if the contingency does happen, and as such it

(a) 1 Swans. 211.

is, strictly and properly speaking, payable on a contingency.

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One of the classes of contingent remainders is, where the contingency may never happen at all; and it is to be presumed that the legislature in using the word contingency, meant that it should apply to such cases as upon other occasions are held to fall within the meaning of that term. Before the late act of parliament, a very extensive set of creditors claiming under marriage articles had, on various occasions, applied to prove debts under commissions of bankrupt, as appears by the cases of *Tully v. Sparkes* (a), *Ex parte Caswell* (b), *Ex parte Greenaway* (c), *Ex parte Groome* and *Ex parte Winchester* (d), *Ex parte Mitchell* (e), *Ex parte Barker* (g), *Ex parte Alcock* (h), *Ex parte Taaffe* (i), and that class of cases. In many of these cases expressions are used of the hardship of trustees under marriage settlements not being able to prove under commissions of bankrupt. And there can be little doubt but that the legislature had in view this numerous class of cases of trustees under marriage settlements: and we think the words of the present act of parliament are sufficient to reach these cases.

But the principal difficulty which has been urged in argument, is, that no valuation can be made by the commissioners within the meaning of the act. If the contingency depends upon the lives of persons in existence, and the order of time in which the various individuals may die, such contingencies are clearly reducible to a matter of calculation, and a valuation may be made of the present worth of the debt; but if the valuation depends upon particular events, which

(a) 2 *Ld. Raym.* 1546.(b) 2 *P. Wms.* 497.(c) 1 *Atk.* 113.(d) 1 *Atk.* 115.(e) 1 *Atk.* 120.(g) 9 *Ves.* 110.(b) 1 *Ves. & B.* 176.(i) 1 *Gly. & J.* 110.

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may or may not take place, and upon the lives of persons not now in existence, and where it is uncertain whether any such persons will ever come into existence, and if *any* do, it is still uncertain *how many* there may be, and the valuation is to be made upon a contingency depending on such a complication of events, then, indeed, it may be admitted that no valuation could be set upon it, as there would be no possibility of bringing such a case within any rules of calculation. And in this particular case, if the calculation must necessarily depend on how many persons there should be connected with there being any children of this marriage, or upon the number of such children, if any, or on the time of the death of these uncertain children, then we should have thought that no valuation could be made of the debt in question, so as to admit it to proof. But we think the valuation is not to depend upon the fact of there being any future children of the marriage, or upon the time of their death. It appears to us such calculation ought to be made merely with reference to the time of the bankrupt's death; and that the valuation is to be simply this, — the present worth of 4000*l.*, payable twelve months after the death of the bankrupt. The settlement contains a positive covenant that the debt is to be paid to the trustees at the end of twelve months after the death of the bankrupt. The trustees are, therefore, entitled to receive the whole at that time, as an absolute debt to themselves. They are directed, after receiving it, to lay out the money in securities mentioned in the settlement, and apply the interest and principal in the way therein directed, and in the first instance, the wife is to have the whole for her life. That would be the state of things if *Smith* had not become a bankrupt. Then how is it altered by the bankruptcy? Suppose the debt to the trustees had not been contingent and had been payable immediately, the trustees

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tees would have proved for the whole debt, without reference to the fact whether there were children or not. Suppose the debt had been payable at a future day certain, then they would have proved for the whole debt, deducting a rebate of interest, and that, also, without reference to the fact whether there were children or not. But this debt being payable at a future day, which is uncertain, there can be no rebate of interest, and, therefore, a value is to be set upon it, and that value, it seems to us, should be governed upon the principle, that the value should be put upon the whole debt, without reference to there being children. There being children or not ought not to affect the right of the wife to the interest for life in the first instance, and she cannot have the benefit of the whole debt unless the value should be taken in the way we have mentioned. If there are children, the trustees will divide the money amongst them, according to the terms of the settlement. And, as to these also, they are entitled to have the benefit of the whole debt, subject to the deduction as to the valuation. And if there are no children, the wife will take the debt by survivorship; reduced, as it will be, by the deductions before alluded to, and by the receipt of dividends under the commission only instead of the debt. In the event of the wife dying before the husband and there being no children, there will be nobody to take, and then it will revert back to the husband's estate.

One argument adduced against admitting the present proof is, that this may, in certain events, be a proof for the benefit of the husband, and that, therefore, it cannot be received. If a proof was made for the immediate benefit of the husband, it would be nugatory to allow it to be made, because the benefit of it must go back to the estate. But if, in the multiplied limitations of a marriage settlement, some benefit may eventually arise to the husband, there can be no reason why the whole

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proof should on that account be rejected. Here there are two ways by which the husband might be benefited; one, if the husband should survive the wife and there should be no children. In that case, the money received as the dividends, would go back to the husband's estate; but then the proof would not be considered as having been made for the benefit of the husband, but the whole proof would fall to the ground, and be as if it had never taken place; because the trusts of the settlement, as far as relate to the sum of 4000*l.*, would not come into operation till after the death of the husband. Again, if the wife should die in the lifetime of the husband, and there should be children who survived the husband, but they should die before they acquired vested interests, then, the husband having survived the wife, his executors would be entitled; but that collateral contingent interest to his executors could not be considered as rendering the proof a proof for the benefit of the husband so as altogether to exclude it; on the contrary, such beneficial interest, vesting in the husband's executor, would form part of the estate of the bankrupt. The case *Ex parte Grundy* (a) was nearly similar to the present; and in that case the trustees were allowed to prove. But as the objection now under consideration was not made there, and the case was determined on the retrospective operation of 6 *G. 4. c. 16.*, that case cannot be adduced as an authority. Upon the whole, we think the demand of the trustees is proveable, upon the grounds and principles which we have above stated.

(a) 1 *Mont. & M^r Arthur*, 292.

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LAMBIRTH and PORTER v. ROFF.

May 8.

THE Plaintiffs, wine and spirit merchants, having supplied the Defendant with spirits, sued him for the amount in an action for *goods sold and delivered*; and by their particular, delivered November 22. 1831, claimed 63*l.* 1*s.* 4*d.*, "being the balance of a debt due from the Defendant to the Plaintiffs for goods sold and delivered by the Plaintiffs to the Defendant in their trade or business of *brewers*."

Lambirth, besides his wine business in partnership with *Porter*, carried on the business of a brewer in partnership with one *English*. The Defendant dealt with *Lambirth* and *English* for beer, and occupied a public house under a lease from *Lambirth, English, H. W. Lambirth* and *Porter*.

At the trial, the delivery of the spirits by *Lambirth* and *Porter* having been proved, a verdict was taken for them, subject to a motion for a nonsuit on the ground that such evidence ought not to have been admitted under the above particular.

Lawes Serjt. accordingly obtained a rule *nisi* for setting aside the verdict and entering a nonsuit, on the ground that the Plaintiffs' particular did not disclose any charge for *spirits*; and on affidavits, that as the Defendant had dealings with *Lambirth* and *English* for beer, and held his house under a lease from the *Lambirths, English, and Porter*, he was taken by surprise by the proof offered at the trial, having come prepared to disprove any debt due to *Lambirth* and *English* as *brewers*.

Stephen Serjt. shewed cause on affidavits, which satisfied the Court that the Defendant had not been sur-

E e 4

prised.

Plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to Defendant in their trade of *brewers*. A verdict having been given for Plaintiffs on proof of delivery of spirits, Defendant obtained a rule *nisi* for a nonsuit, on the ground that he had been surprised by the variance between the particular and the proof: it appearing, however, that he had been neither surprised nor misled, the Court discharged the rule.

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prised. The Plaintiffs, by a letter signed "*Lambirth and Porter*," had, in *April* 1831, demanded 65*l.* for spirits supplied by them to the Defendant; they arrested him for that sum on the 1st of *June*; declared only in the names of *Lambirth and Porter*; and their attorney, in *September*, wrote a letter to the Defendant's attorney, stating, in answer to a letter from him, that there was no such firm as *Lambirth, English, and Co.*, but that 60*l.* and upwards was due from the Defendant to *Lambirth and Porter* for spirits, and near 20*l.* to *Lambirth and English* for beer. *Stephen* contended, that the only object of a particular being to limit a plaintiff's demand, it was sufficient if the Defendant were not misled; *Day v. Bower* (a), *Davies v. Edwards*. (b)

Lawes and Bompas Serjts., in support of the rule, urged that great laxity and confusion would be introduced into practice if this particular were held sufficient, and they relied on *Macarthy v. Smith* (c), where it was held, that the plaintiff could not recover for money had and received under a bill of particulars for goods sold and delivered, though it appeared the goods had been delivered to defendant as agent, for sale or return, and that he had sold them, and received the value.

TINDAL C. J. The Plaintiffs' attorney has been guilty of great negligence; but the question is, whether the Defendant has been taken by surprise. Looking at the evidence adduced on the trial, the affidavits now read, and the Defendant's mode of shaping his case, we cannot see that he has been deprived of any just ground of defence. The letters of the Plaintiffs and their attorney excluded the possibility of his acting under any mistake. We should be carrying the principle of rigour

(a) 1 *Campb.* 69. n.

(b) 3 *M. & S.* 380.

(c) 8 *Bingh.* 145.

with respect to particulars too far, and convert them into a trap for plaintiffs, if we were to hold that every slight variance, whether it misled the defendant or not, is to defeat the plaintiff's action.

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PARK J. I yield to the opinion of the Court with reluctance, being apprehensive of the carelessness to which it may give rise.

GASELEE J. I concur in the decision of the Court, though I am not sure that we are right. It is clear, however, that the letters of the Plaintiffs and their attorney would have sufficiently apprised the Defendant of the subject-matter of the action.

ALDERSON J. The material question in all these cases is, whether there is any thing in the bill of particulars calculated to mislead the defendant; if not, it is the duty of the Court to see that a party is not entrapped and defeated by a slight variance, which could not mislead the defendant. In *Davies v. Edwards*, the particular of demand was rent of land at *Chepstow*; the defendant objected that the land was in another parish; and Lord *Ellenborough* said, "If the defendant could have shewn not only that he might have been but that he was actually surprised, there would have been some foundation for the argument. But here no deception whatever was practised, nor the defendant misled. If he had gone to a Judge's chambers, as it was competent to him to do, for further particulars, and had stated that he held no other but these premises, would it not have been useless to have granted him a further particular?" Can I say that the Defendant has been deceived, when he was told that the Plaintiffs were about to proceed for 65*l.* due for spirits; when this is followed up by an arrest for that amount; by a letter explaining the

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the two accounts, one for beer with *Lambirth* and *English*; one for spirits with *Lambirth* and *Porter*; by an action brought by *Lambirth* and *Porter*, and by a bill of particulars delivered in their names?

Rule discharged.

(a) See *Harrison v. Wood*, ante, 371.

May 12.

WALKER v. WATSON.

A balance of less than 5*l.* due on a bill of exchange for 17*l.* drawn payable in *London*, and reduced by previous payment, Held, a debt under 5*l.* arising within the jurisdiction of the *Halifax* Baron Court, the parties residing at *Halifax*.

THIS was a writ of false judgment, which *Merewether* Serjt. had obtained a rule *nisi* to set aside, on the ground that the action had been brought in the *Halifax* baron court for a debt of less than 5*l.*, both parties residing within the jurisdiction of that court. By the 17 G. 3. c. 15. s. 30., the *Halifax* court act, it is enacted, that "no plaint, suit, or action to be entered or commenced in this court for any debt or damages under 5*l.* arising within the said honor, or any judgment or other proceedings to be had thereupon, shall be removed or removeable by any writ of *recordari facias loquelam, certiorari*, false judgment, or otherwise howsoever, but such judgments in this court shall be final and conclusive to all intents and purposes whatsoever."

Jones Serjt. shewed cause upon an affidavit which disclosed that the action was brought for a balance, of less than 5*l.* indeed, but due on a bill of exchange for 17*l.*, drawn payable at *Masterman's* in *London*, and reduced by previous payments. He contended that the suit was not for a debt or damage of 5*l.* or under, arising within the jurisdiction of the *Halifax* court.

court. The demand *arose* from a debt of 17*l.*, and due in *London*, not *Halifax*. In *M'Collam v. Carr* (a), it was held that the jurisdiction of the *Middlesex* court of conscience, under an act of parliament, the language of which is nearly the same as the above, did not extend to contracts made on the high seas; nor would the Court allow a suggestion for double costs under 23 G. 2. c. 33., where the original debt being above 40*s.* had, by a balance of accounts, been reduced below that sum.

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TINDAL C. J. The whole question turns on the thirtieth section of 17 G. 3. c. 15., which enacts, that "no plaint, suit, or action to be entered or commenced in this court for any debt or damages under 5*l.* arising within the said honor, or any judgment or other proceedings to be had thereupon, shall be removed or removeable by any writ of *recordari facias loquelam, certiorari*, false judgment, or otherwise howsoever, but such judgments in this court shall be final and conclusive to all intents and purposes whatsoever." And this suit was entertained for a debt, under 5*l.* at the time of entertaining it. I cannot agree in the position, that because the debt was originally more, the party ought not to sue in such a court, when by payment it has been reduced below 5*l.* All the old cases are the other way. Upon this affidavit, it is clear that before the present suit was commenced, the original demand had been reduced by payment below 5*l.* It is impossible to contend that it is not a case within the act.

PARK J. When we see the anxiety of the legislature to save expenses to poor suitors, we cannot defeat the intention of the act by allowing such a proceeding as this.

(a) 1 B. & P. 223.

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GASELEE and ALDERSON Js. concurring, the rule was made

Absolute.

May 2.

DIGBY v. ALEXANDER.

A plea in abatement by an Earl, of misnomer in his title of dignity, must allege positively, and not merely by inference, that he was Earl at the time of suing out the writ.

TO an action on a bill of exchange set out in the declaration as addressed to the Defendant by the title, addition, and description of the Right Honorable the Earl of *Stirling*, and accepted by him by the name or title of *Stirling*, the Defendant pleaded in abatement as follows: —

And the Right Honorable *Alexander* Earl of *Stirling*, of that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, against whom the Plaintiff has issued his said writ, and declared thereon by the name of *Alexander Humphreys Alexander*, in his own person comes, and saving to himself all advantages and exceptions, as well to the writ as to the declaration as aforesaid, prays leave to imparle thereon and to have until *Wednesday* the 11th day of *January*, in *Hilary* term, in the second year of the reign of our lord the now King; and he hath it. At which day come here, as well the Plaintiff by his said attorney, as the said Right Honorable *Alexander* Earl of *Stirling* in his own person. And the said Earl of *Stirling* says that long before the issuing the said writ of the Plaintiff in this suit, to wit, on the 20th day of *April*, in the sixth year of the reign of the lord *George IV.* late King of the United Kingdom of *Great Britain* and *Ireland*, defender, &c. the said lord the late King, by his royal proclamation, bearing teste at *Carlton House* the day and year last aforesaid, after reciting that *Alexander* Earl of *Balcarras* had been duly elected and returned to be one of sixteen peers of *Scotland*,

Scotland, to sit in the House of Peers in the then present parliament of the United Kingdom of *Great Britain and Ireland*, and was then since deceased, in order to the electing another peer of *Scotland* to sit in his room by and with the advice of his privy council, issued forth that proclamation, strictly charging and commanding all the peers of *Scotland* to assemble and meet at *Holyrood House*, in *Edinburgh*, on *Thursday* the 2d day of *June* then next, between the hours of twelve and two in the afternoon, to nominate and choose another peer of *Scotland* to sit and vote in the House of Peers of that then present parliament of the United Kingdom of *Great Britain and Ireland*, in the room of the said *Alexander Earl of Balcarras*, deceased, by open election and plurality of voices of the peers that should then be present, and of the proxies of such as should be absent; (such proxies being peers, and producing a mandate in writing duly signed before witnesses, and both constituent and proxy being qualified according to law;) and the lord clerk register, or such two of the principal clerks of session as should be appointed by him to officiate in his name, were thereby respectively required to attend such meeting, and to administer the oath required by law to be taken there by the said peers, and to take their votes; and immediately after such election made and duly examined, to certify the name of the peer so elected, and to sign and attest the same in the presence of the said peers, the electors, and return such certificate into the High Court of Chancery of *Great Britain*. And the said lord the said late King thereby strictly charged and commanded that that proclamation should be duly published at the Market Cross at *Edinburgh*, and in all the county towns in *Scotland*, twenty-five days at least before the time thereby appointed for the meeting of the said peers to proceed in such election. And the said Earl of *Stirling* further says that the said proclamation

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clamation was afterwards, and more than twenty-five days before the time thereby appointed for the meeting of the said peers to proceed on such election, to wit, on the 6th day of *May*, in the year 1825, duly published at the Market Cross at *Edinburgh* aforesaid, and in all the county towns of *Scotland*. That afterwards, and long before the issuing of the said writ of the Plaintiff in this suit, and before the assembly and meeting hereinafter next mentioned, to wit, on, &c. at, &c. the said lord clerk register duly appointed Sir *Walter Scott*, Bart. and *Colin Mackenzie*, Esq. to be clerks to the meeting so to be held as aforesaid for such election as last aforesaid, and two of the principal clerks of session to officiate in his name thereat. That afterwards, and before the issuing of the writ of the Plaintiff in this suit, to wit, on the 2d of *June* 1825, divers of the peers of *Scotland*, in obedience to the said proclamation, did assemble and meet at the palace of *Holyrood House* in *Edinburgh*, between the hours of twelve and two in the afternoon of that day, to nominate and choose a peer of *Scotland* to sit and vote in the House of Peers of that then present parliament of the United Kingdom of *Great Britain and Ireland* in room of the said *Alexander* Earl of *Balcarras* deceased; and that the said Sir *Walter Scott* and *Colin Mackenzie*, the said two clerks of session so nominated and appointed as aforesaid, attended the said meeting or assembly, and officiated thereat for the purpose aforesaid. That at the said assembly or meeting so held as aforesaid for the purpose of such election as aforesaid, the long or great roll of the peers of *Scotland* was called over, except those who stood attainted of high treason. That the said Defendant then being Earl of *Stirling* of that part of the United Kingdom of *Great Britain and Ireland* called *Scotland*, attended and was present at the said meeting or assembly for the purpose of giving his vote as a peer of *Scotland*

at

at and upon the said election; and that upon the title of Earl *Stirling* being called, he, the Defendant in this suit, claimed to vote, as Earl of *Stirling* and entitled to the honors and dignity of Earl of *Stirling*; and he, the Earl of *Stirling*, the Defendant in this suit, then and there answered to his title of Earl of *Stirling*, and his vote was then and there taken and received by the said Sir *Walter Scott* and *Colin Mackenzie*, the two clerks of session so nominated and appointed by the lord clerk register as aforesaid for the purpose aforesaid, and officiating as aforesaid. And he further says, that the said Sir *Walter Scott* and *Colin Mackenzie*, the said two clerks of session so nominated and appointed as aforesaid, and officiating as aforesaid, then and there at the said meeting or assembly so held as aforesaid, for the purpose in that behalf aforesaid, to wit, on the said 2d day of *June* 1825, in the palace of *Holyrood House* aforesaid, administered to him, the said Earl of *Stirling*, the oath required by law to be taken by him as a peer of *Scotland*, and took and received his vote at the said election; and that he did as Earl of *Stirling* as aforesaid vote at the said election for *James* Viscount of *Strathallan* to sit and vote in the House of Peers of the then parliament of the United Kingdom of *Great Britain* and *Ireland* in the room of the said *Alexander* Earl of *Balcarras* deceased, as by the record of the proceedings at the said election remaining in the general register house of our lord the now King at *Edinburgh* aforesaid more fully appears. And the said Earl of *Stirling*, Defendant in this suit, further says that the said Sir *Walter Scott* and *Colin Mackenzie*, the said two clerks of session so nominated and appointed, and officiating as aforesaid, immediately after such election made and duly examined, certified the name of the peer so elected, and signed and attested the same in the presence of the peers, the electors, and returned the said certificate

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into the High Court of Chancery of *Great Britain*, as by the record thereof remaining in the said High Court of Chancery at *Westminster*, in the county of *Middlesex* more fully appears. That by virtue of the said election, the said Viscount of *Strathallan* afterwards, and before the issuing the writ of the Plaintiff in this suit, to wit, on the 6th of *June* 1825, took his seat and voted in the House of Peers in the then parliament of the United Kingdom of *Great Britain and Ireland*. That afterwards, to wit, on the 24th day of *July*, in first year of the reign of our lord the now King, our said lord the now King, by his royal proclamation, bearing date at *Westminster*, the day and year last aforesaid, after reciting that he, our said lord the now King, had in his council thought fit to declare his pleasure for summoning and holding a parliament of his United Kingdom of *Great Britain and Ireland*, on *Tuesday* the 14th day of *September* next ensuing the date of his said royal proclamation, in order, therefore, to the electing and summoning the sixteen peers of *Scotland*, who were to sit in the House of Peers, by the advice of his privy council, issued forth that his royal proclamation, strictly charging and commanding all the peers of *Scotland* to assemble and meet at *Holyrood House, Edinburgh*, on *Thursday* the 2d day of *September* then next ensuing, between the hours of twelve and two in the afternoon, to nominate and choose the sixteen peers to sit and vote in the House of Peers in the said ensuing parliament, by open election and plurality of voices of the peers that should be then present, and of the proxies of such as should be absent, such proxies being peers, and producing a mandate in writing duly signed before witnesses, and both constituent and proxy being qualified according to law: and the lord clerk register, or such two of the principal clerks of session as should be appointed by him to officiate in his name, were thereby respectively required

required to attend such meeting, and to administer the oath required by law to be taken there by the said peers, and to take their votes, and immediately after such election made and duly examined to certify the names of the sixteen peers so elected, and sign and attest the same in the presence of the said peers the electors, and return such certificate into our said lord the now king's High Court of Chancery of *Great Britain*. And our said lord the now king did, by the said last-mentioned proclamation, strictly command and require the provost of *Edinburgh*, and all other the magistrates of the said city, to take special care to preserve the peace thereof during the time of the said election, and to prevent all manner of riots, tumults, disorders, and violence whatsoever. And our said lord the now king did, by the said last-mentioned proclamation, strictly charge and command that his royal proclamation should be duly published at the market-cross at *Edinburgh*, and in all the county towns in *Scotland*, twenty-five days at least before the time thereby appointed for the meeting of the said peers to proceed to such election. The Defendant then averred, that the said last-mentioned proclamation was afterwards, and more than twenty-five days before the time thereby appointed for the meeting of the said peers to proceed on such election as last aforesaid, to wit, on the 29th day of *July* 1830, duly published at the market-cross in *Edinburgh* aforesaid, and in all the county towns in *Scotland*. That afterwards, and long before the issuing of the said writ of the Plaintiff in this suit, and before the assembly and meeting hereinafter next mentioned, to wit, on the 19th day of *August* in the year last aforesaid, at, &c. the lord clerk register of *Scotland* duly nominated and appointed *Thomas Thomson* and *Adam Rollard*, Esqrs., two of the principal clerks of session, to be clerks of the meeting:

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to be held as last aforesaid, for the purpose of such election as last aforesaid, and to officiate in his name at the said meeting. That afterwards, and before the issuing of the said writ of the Plaintiff in this suit, to wit, on, &c. divers of the peers of *Scotland*, in obedience to the said last mentioned proclamation, did assemble and meet at the palace of *Holyrood House* in *Edinburgh* aforesaid, between the hours of twelve and two in the afternoon of that day, to nominate and choose the sixteen peers of *Scotland*, to sit and vote in the House of Peers in the then ensuing parliament of the United Kingdom of *Great Britain* and *Ireland*; and that the said *Thomas Thomson* and *Adam Rollard*, the said two clerks so nominated and appointed as aforesaid, attended the said last mentioned meeting, and officiated thereat for the purpose aforesaid. That at the said assembly or meeting so held as last aforesaid, for the purpose of such election as last aforesaid, the long or great roll of the peers of *Scotland* was called over, except the names of those who stood attainted of high treason, and that the name of him, the Defendant in this suit, as *Earl of Stirling*, was then and there called as a peer of *Scotland*. That he did not attend the said last-mentioned meeting, but sent a list signed by him, together with the documents and instruments as by law directed, containing the names of sixteen peers of *Scotland*, for whom he intended to vote at the said last-mentioned election, to be nominated and chosen to sit and vote in the House of Peers in the said then ensuing parliament of the United Kingdom of *Great Britain* and *Ireland*, to wit, the Marquess of *Queensberry*, &c. &c. And he further says, that the vote of him, the said *Earl of Stirling*, by such signed list was then and there taken and received by the said *Thomas Thomson* and *Adam Rollard*, the said two clerks so nominated and appointed as last aforesaid, and officiating as last aforesaid,

said, for the said several peers named in the said signed list, to sit and vote in the House of Peers in the said then ensuing parliament of the United Kingdom of *Great Britain and Ireland*; and that all the peers named in the said list were, at the said assembly or meeting so held as last aforesaid, elected, nominated, and chosen to sit and vote in the House of Peers in the said then ensuing parliament of the United Kingdom of *Great Britain and Ireland*; as by the record of the proceedings at the said last-mentioned election remaining in the general register office of our said lord the now king at *Edinburgh* aforesaid more fully appears. That the said *Thomas Thomson* and *Adam Rollard*, the said two clerks so nominated and appointed, and officiating as last aforesaid, immediately after such election made and duly examined, certified the names of the sixteen peers so elected, and signed and attested the same in the presence of the said peers, the electors, and returned the said certificate into our said lord the now king's High Court of Chancery of *Great Britain*, as by the record remaining in the said High Court of Chancery at *Westminster* aforesaid more fully appears. "And so the said earl, the Defendant in this suit, says that he, before and at the time of the issuing of the said writ of the Plaintiff in this suit, was, and ever since has been, and still is, Earl of *Stirling* of that part of the United Kingdom of *Great Britain and Ireland*, called *Scotland*, and by that name and title ever since his vote was so received at the said first mentioned election, has been named and called, without this that he the said *Alexander* Earl of *Stirling* now is, or at the time of issuing the said writ of the Plaintiff in this suit was, named, or called by the name of *Alexander Humphreys Alexander*, as by the said writ and declaration thereon founded is above supposed: and this he is ready to verify, wherefore, inasmuch as he is not sued and named, and called in by the said writ, and the de-

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claration thereon founded in and by his said name and dignity of *Alexander* Earl of *Stirling*, he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed, &c."

Demurrer and joinder.

Stephen Serjt. in support of the demurrer. The former decision in this case (a) applies to setting aside the bail bond only, and does not warrant a plea like this. The plea only states that the Defendant voted twice at the election of *Scotch* peers; but not that his vote was effectual. Defendant nowhere states he is Earl of *Stirling*, or how. This is in effect a plea of misnomer, to be tried by a jury; and should not allege mere circumstances, but the fact proposed to be proved by those circumstances; for the consequence assumed does not necessarily follow from the facts stated. If a party, instead of pleading soil and freehold, were to plead that he voted in respect of the land at two elections for knights of the shire, it would not follow that the land was his. It is compatible with this plea that the Defendant may have tendered his vote and have been rejected upon subsequent occasions. The plea is double; and it does not state that the Defendant pursued the forms required by statute on tendering his vote; as by taking the oaths; or that he was Earl at the time this writ was sued out. In *Lett v. Mills* (b) the defendant pleaded in abatement, that *suscepit ordinem militare, et jam miles existit*; but it not being said that he was a knight *tempore exhibitionis billæ*, or after the last continuance, the Court ordered a *respondeat ouster*.

Taddy Serjt. *contra*. The plea sufficiently shews that the Defendant is Earl of *Stirling*, and how. The

(a) *Ante*, 55.

(b) 6 *Mod.* 105.

instrument on which the Plaintiff sues treats the Defendant as Earl of *Stirling*; the Defendant accepts by that name; he shews the facts which prove him to be Earl of *Stirling*; and says, that he *being* Earl of *Stirling*, voted; which is the same as an allegation that he was Earl. 2 *Wms. Saund.* 352. n. 3. And, after discharging the defendant from his bail bond, as a privileged person (a), the Court will not now reject his claim. For the defendant has no remedy except by plea. In *Lord Banbury's* case (b), upon a motion for a *supersedeas* to a writ of *latitat* sued out against Lord Banbury as Charles Knolls, the Court said, "If my lord had ever been summoned to parliament, and had a writ to shew that there was no dispute about the identity of the person, it would have been reasonable to have granted a *supersedeas*; but in this case, of a lord who has never sat there, they could not do it, for they could not try peerage upon a motion; but his lordship might plead it." And it is true that an *English* peer must shew his title by summons or patent; but that rule cannot apply to a *Scotch* peer, who is never summoned; and as for a patent, the most ancient of the nobility in *Scotland*, and other parts of *Europe*, are territorial, and possess no records of the creation of their titles. The Lords of Session were ordered, *June* 12th, 1739, to lay before the House a roll or list of the peers of *Scotland*, and the particular limitation of each peerage; upon which they made their report; and, after stating various circumstances, concluded by saying, "That the Lords of Session are not able to give your Lordships any reasonable satisfaction touching the limitations of the peerages that are still continuing." In *Co. Litt.* 16 a. it is said, "A man may

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(a) See *ante*, 55.(b) 2 *Ld. Raym.* 1247.

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have an inheritance in title of nobilitie and dignitie three manner of wayes, that is to say, by creation, by descent, and by prescription. By creation, two manner of ordinary wayes (for I will not speake of a creation by parliament), by writ, and by letters patent." "And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. And if issue be joined in any action, whether he be a baron, &c., or no, it shall not be tryed by jury, but by the record of parliament which could not appeare unlesse he were of the parliament. Therefore a duke, earl, &c. of another kingdome, are not to be sued by those names here, for that they are not peeres of our parliament." This plea, therefore, does not proceed on the ground of Defendant's being a peer by writ or patent. Before the union with *Scotland*, there was no writ or summons to peers. *Magna Charta* prescribed a summons to prevent the inconvenience of proclamations here. But that was never adopted in *Scotland*. *Lord Kaimes's Brit. Antiq.* 55. *Spottiswood's Pract.* 39. gives a proclamation for calling parliament together. The statute 6 Ann. c. 23. takes up that state of facts; and the peers of *Scotland* do not receive any summons. A list of peers was made and considered in committee, February 12th, 1708, (18 *Journal of Lords*, 399.) on the first assembling of the united parliament; and in 25 *Journal*, 466. a return, as used in the *Scotch* parliament of 1706, containing an Earl of *Stirling*. And that roll is still referred to as authority. *Wight on Elections*, c. 2. p. 125. The Defendant, therefore, could not plead more conclusively, for the voting at the election of a representative peer being the only act by which a *Scotch* peer can assert his title, that act is equivalent to summons or patent with an *English* peer. [*Per Curiam*. All this is good evidence, but no plea that Defendant is Earl.]

It

It alleges that in substance. In the *Countess of Rutland's* case (a), it was held that Duke or no Duke should be tried by the record; Duchess or no Duchess by the country, for her dignity accrues by matter of fact; and for the same reason, matter of record forms no part of the title of a *Scotch* peer.

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TINDAL C. J. It appears to me that this plea being pleaded in abatement, is insufficient, and that our judgment must be, that the Defendant do answer over. The plea is strictly a plea in abatement on the ground of misnomer; for although it is otherwise in the case of a baron, in the case of an earl the title is the substance of the name; and as this is a dilatory plea, which is always to be taken strictly, the question is, whether the Defendant has so pleaded that an issue can be taken on the point which he proposes to make the ground of his plea. Now there is no distinct and positive allegation that on the day the writ in this cause was sued out the Defendant had the name suggested and no other. The plea begins by stating that in 1825 the King issued his proclamation commanding all peers of *Scotland* to assemble at *Holyrood House* to choose a peer of *Scotland* to sit in parliament in the room of the Earl of *Balcarras* deceased; that at the meeting held in pursuance of such proclamation, the Defendant, then being Earl of *Stirling*, attended for the purpose of giving his vote as a peer of *Scotland* at the said election; that upon the title of Earl of *Stirling* being called, he claimed to be Earl of *Stirling*, and answered to his title, and his vote was then taken by Sir *Walter Scott* and *Colin Mackenzie*, that they administered to him the oath required to be taken by a peer of *Scotland*, and took his vote; and that he did as Earl of *Stirling* vote. That in *September* 1830,

(a) 6 Rep. 52. b.

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upon the occasion of another election, he sent in his vote, which was received by the clerks. It amounts to no more, therefore, than that the Defendant *acted* as Earl of *Stirling*; not that he was *de jure* Earl. He says, indeed, that, "*being* Earl of *Stirling*, he voted;" but no allegation so distinctly predicates the fact that he *was* Earl, as that issue can be taken on it. The precedents are few, but all the forms of the common plea of misnomer go to the day of suing out the writ *inclusivè*: they state "that *C. D.*, against whom the plaintiff hath exhibited his bill by the name of *E. F.*, is named and called by the name of *C. D.*, and by that name hath always hitherto been named and called; without this, that he is, or at the time of exhibiting the plaintiff's bill was, named or called by the name of *E. F. (a)*;" excluding, therefore, the possibility of there being any other name in which at that time the writ could be sued out: and in two ancient precedents of pleas of abatement for misnomer in title of dignity, there is a distinct allegation of the existence of the dignity. Thus, in the Year-book 39 *Ed. 3.* p. 85. B. Brief de Ravishmēt de Gard' fuit port vs *Gilbert Umfravil* Chivaller. *Kirton* demanda jugmēt de bŕ, p̄ c̄ q̄ *Gilbert Umfravil* est Conte d'*Angos*, nient nome Conte. Jugement de bŕ. *Fend.* Le Conte d'*Angos* n'est p̄z deins le royaume d'*Angleterre*, et p̄tant c̄ ne poit estre trie, le quel il soit Conte, on nient: issint n'ē my cel' nom de dignity, fors q̄ surnom. Jugemēt, si nŕ bŕ ne soit assez bon. *Kirton.* Le nom de Conte est nom de dignity, et p̄ cel' nom doit il estre nom: et il est somone a ches̄c parliamēt per nom de Conte; et le Roy mander̄ a luy le grand' seal' come a Per del tŕe. Et puz le bŕ abata, &c. And in *Fitz. Abr. Brief*, pl. 40. Labb. de founteyn; port bŕe de faux Inp̄sonmet vers un

(a) See 3 *Chitty on Pleading*, "Pleas in Abatement."

W. Fraunc. *Fulth.* Le bře est si abbas fecerit te securum niēt nosmant son propre nosme: par que *Marten*; Labb. est nosme de dignitie * * * et abb. est suffiç, nosme et sil ad suffiç nosme il suffis etc * * * *Mes si Counte soit a porteř bre il covient q' ambideux nosmes soient nosmes cōe J. Erle de &c.* Briefe, pl. 40. So in the case of the Earl of *Banbury* (a), indicted for murder by the name of *Charles Knolls*, Esq., in which there was a plea of misnomer in abatement to the indictment, the defendant alleged in his plea, "quod ipse ad indictamentum illud respondere compelli non debet quia dicit quod Dominus Carolus primus nuper Rex *Angliae*, &c. per litteras suas patentes" now produced, &c. created his grandfather an Earl of this kingdom, &c. and thereby the honour was entailed upon the male line; and then shews his own descent, *and that he is heir male, and Earl of Banbury*, and concludes with hoc paratus est verificare, &c. And this plea was afterwards amended by adding an averment "that his uncle, who was of the elder branch, was dead without issue, *and that he himself was a peer at the time of the plea pleaded.*"

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The present plea, therefore, not specifying any circumstance from which it can be predicated that the Defendant was Earl of *Stirling* at the time the writ issued, must be held insufficient.

PARK J. The Plaintiff was obliged to set out the bill of exchange as it was drawn, but he nowhere, in his own language, calls the Defendant Earl of *Stirling*. Nor if he had done so, would that be an answer to the present objection; for in *Haworth v. Spraggs* (b) it was held that the defendant in a plea in abatement of misnomer must give his surname, as well as his true Christian name, although his true surname be used in the de-

(a) *Carth.* 297.

(b) 8 T. R. 515.

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claration. That case was confirmed in *Docker v. King*. (a)

GASELEE J. I am of the same opinion. Four fifths of this plea are matters of evidence: the conclusion is merely argumentative; and there is nowhere a positive allegation that the Defendant is a peer. A plea in abatement ought to be correct in every point; and it does not follow that the Defendant has continued to be *Earl of Stirling* even if he were so at the time of voting.

ALDERSON J. I am of the same opinion. Every fact alleged in this plea may be true, and yet the Defendant may not now be *Earl of Stirling*. That is sufficient to render the plea bad. It contains nothing but evidence for a jury, and not a distinct allegation of the thing to be proved, that the Defendant was *Earl of Stirling* at the time of the writ. There must be judgment of

Respondeat ouster. (b)

(a) 5 *Taunt.* 652.

(b) See the precedent in *Blackmore v. The Earl of Wigtown*, sued as the Right Hon. *Hamilton Fleming*, 3 *Wentworth's Pleading*, 295.

As to the question whether peerage is available as an ob-

jection to a proceeding by bill in K. B., unless pleaded in abatement, see *Lord Lonsdale v. Littledale*, 2 H. Bl. 267. 299, and the note (a) p. 272. See also *Hosier and Another v. Lord Arundell*, 3 Bos. & Pul. 9. and the note (b).

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ANDREWS v. THORNTON.

May 12.

SLANDER. The declaration, after the usual averment of the Plaintiff's good name, his innocence of such misconduct as that imputed to him by the Defendant, and the good opinion of his neighbours, stated, that before the committing of the grievances by Defendant, as thereafter mentioned, Plaintiff had been, and then was, a mariner, and the employment of a mariner had used and exercised with great credit and profit to himself, to wit, at, &c.; that Plaintiff, in certain parts beyond the seas, to wit, at *Sincapore*, had shipped himself in and on board of a certain ship or vessel called the *Vittoria*, as a mariner and chief mate for a certain voyage, to wit, from *Sincapore* aforesaid to *London*, of which said ship or vessel Defendant had been, and then was, a freighter, to wit, at, &c.; that before, &c., and before the arrival of the said ship or vessel at *London*, to wit, on the high seas, a mutiny of divers of the crew of said ship or vessel had broken out in and on board of said ship or vessel, and the master or commander and divers mariners belonging to the crew of said ship or vessel had been killed, and divers large quantities of the cargo of said ship or vessel had been thrown overboard by the mutineers, to wit, at, &c.; that said Plaintiff, being employed as a mariner in and on board of said ship or vessel as aforesaid, having, with the assistance of certain of the crew of said ship or vessel, recovered the same from the power and control of said mutineers, and having taken upon himself the command and navigation of said ship or vessel, had proceeded with the same to a certain port in parts beyond the seas, to wit,

In an action of slander, although there be no justification, and no special damage alleged, the Plaintiff, if he recovers, is entitled to the expense of witnesses necessary to prove an inducement explanatory of the slander, and his professional reputation.

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wit, the *Mauritius*, the same being the most eligible port to proceed to after such mutiny as aforesaid, to wit, at, &c.; that Plaintiff, at the *Mauritius* aforesaid, had necessarily been obliged to discharge and unload the cargo of said ship or vessel, and to reload the same in and on board said ship or vessel, at a very considerable expense, and in so doing, had employed one *William Aiken* as agent for said ship or vessel for that purpose, and having done so, said Plaintiff had safely and securely navigated and brought said ship or vessel, together with her cargo, so reloaded as aforesaid, to her port of delivery, to wit, at, &c. Nevertheless said Defendant, well knowing the premises, but greatly envying the happy state and condition of said Plaintiff, and contriving, and wickedly and maliciously intending to injure said Plaintiff in his good name, &c., on, &c., at, &c., in a certain discourse which said Defendant then and there had of and concerning said Plaintiff, and of and concerning his said employment as a mariner in and on board of said ship or vessel, and of and concerning said cargo of said ship or vessel, in the presence and hearing of divers good and worthy subjects of this realm, then and there, in the presence and hearing of said last mentioned subjects, falsely and maliciously spoke and published of and concerning said Plaintiff, and of and concerning his said employment as a mariner in and on board of said ship or vessel, and of and concerning said cargo of said ship or vessel, these false, scandalous, malicious, and defamatory words following, that is to say,—“There was no reason for discharging the cargo. I do not believe more than 100*l.*, or at most 200*l.* worth of the cargo was thrown overboard by the mutineers; and I believe that *Andrews* has connived with Mr. *Aiken*, the agent at the *Mauritius*, in creating expense, for the purpose of putting money in his pockets; he ought to be tried at the
bar

bar of the *Old Bailey*, and no respectable merchant will ever employ him."

There were several other counts; and in the tenth, the only words alleged to have been uttered were, "He ought to be tried at the bar of the *Old Bailey*." To the damage, &c.

The Defendant pleaded the general issue; and at the trial in *London*, a verdict having been found for the Plaintiff, the prothonotary, on the taxation of costs, had allowed, among other charges, 23*l.* for the expense of a witness from *Liverpool*, to prove the Plaintiff's skill and character as a mariner; and 12*l.* for the expense of a witness called to prove the circumstances of a mutiny on board the *Vittoria*.

Spankie Serjt. obtained a rule *nisi* to review the taxation as to these charges, on the ground that the Defendant not having pleaded a justification, and there being no allegation of special damage, no question could properly arise as to the Plaintiff's character or the circumstances of the mutiny, the only point in issue being, whether or not the Defendant had spoken the words with which he was charged.

Wilde Serjt. shewed cause. Without proof of the introductory allegations the sting of the slander could not have been understood; and without proof of the estimation in which the Plaintiff was held, the jury would have been at a loss as to the proper measure of damages.

Spankie. The assertion, "That the Plaintiff ought to be tried at the bar of the *Old Bailey*," is sufficiently explicit, and needs no explanation in the way of introductory allegations. The witnesses objected to can only have been called for the purpose of harassing the Defendant with costs.

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TINDAL C. J. I agree in one observation which has been made on the part of the Defendant, that when there is no justification in an action of slander, in general the expense of witnesses ought not to be allowed who might have become necessary if a justification had been pleaded. But it would be looking too narrowly at this record to take that proposition without qualification; for the words complained of in the tenth count are not actionable of themselves, but only become so on the proof of the circumstances to which they were intended to apply, — “He ought to be tried at the bar of the *Old Bailey*.” There could not be a more vague imputation of misconduct; and it was necessary, therefore, for the Plaintiff to state and prove the inducement which gives it a meaning. The question is, then, whether he has abused his privilege by calling more witnesses than were necessary. Surely, to explain the extent to which he might be injured, and the meaning of the words, it was competent to him to shew that he gained his livelihood as a captain of a ship; that a mutiny broke out; that goods were thrown overboard; and the residue carried to the *Mauritius*: the more so, as it was insinuated that this was not the fact, and that the goods had been improperly disposed of. We ought not to be too nice in cutting down the Plaintiff’s proof to the exact amount, at which, under bare poles, he may conduct his vessel into port.

Rule discharged.

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SMITH v. HARDY.

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TO debt on judgment, the Defendant pleaded a release, bearing date *December* 1831, but destroyed by accident.

Wilde Serjt., upon an affidavit that the plea was false, obtained a rule *nisi* to sign judgment as for want of a plea.

Adams Serjt., who shewed cause, relied upon *Smith v. Backwell* (a), where the Court reviewed all the preceding cases, and refused to set aside upon affidavit of its falsehood, a plea of acceptance by the plaintiff of twenty pipes of port wine in satisfaction of his demand; intimating, that in future, similar applications should be discharged with costs.

To debt on a judgment, the Defendant pleaded a release of *December* 1831, destroyed by accident. Upon affidavit that the plea was false, the Court allowed the Plaintiff to sign judgment as for want of a plea.

Wilde. That case only decides that the Court will not interfere where the plea, though false, is in the usual form, and does not create perplexity, or raise more than a single issue; but where, as in the present instance, the plea occasions perplexity by raising several issues, the Court will interfere. The result of all the cases was stated by *Gaselee* J., who said, "Where the plea has raised different issues, has been exceedingly intricate, or has been a mockery of the proceedings of the Court, a discretionary power has sometimes been exercised by the Judges; but that cannot be done with respect to a single plea, which has nothing improper on the face of it."

(a) 4 *Bingh.* 512.

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TINDAL C. J. If this had been a plea on which only one issue could have been taken, and there had been a *profert in curiam* of the alleged release, I am not prepared to say that we should not have discharged this rule. But this plea is so ingeniously prepared, that it is likely to occasion perplexity and expense, and the Plaintiff might be at a loss whether to take issue on the existence of the release or its destruction by accident. The case, therefore, falls within the principle of *Shadwell v. Berthoud* (a), and *Body v. Johnson* (b), where, upon an affidavit of its falsehood, the Court allowed the plaintiff to sign judgment upon a plea so framed as that it might reasonably induce the plaintiff to consult counsel to know how to deal with it.

PARK J. The distinction has been properly taken by my Brother Gaselee in *Smith v. Backwell*. The present plea as presenting two points for issue, ought not to avail the Defendant after affidavit of its falsehood.

GASELEE J. This plea raises different issues, and has something improper on the face of it, for it is improbable that the Defendant should be unable to produce a deed executed in *December* last. Those who put in these false pleas, would do well to look to the practice in early times, when, it appears they were liable to be severely punished.

ALDERSON J. I agree with Lord *Ellenborough*, who said that no perverse ingenuity should be allowed in framing these pleas.

Rule absolute.

(a) 5 B. & A. 750.

(b) Ibid. 751.

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STRATTON v. GREEN.

May 12.

THE Defendant paid 44*l.* 18*s.* 2*d.* into court in an action for fixtures, which the Plaintiff had relinquished to him at his request; but, before the cause was brought to issue, the parties, by a submission which did not mention the subject of costs, appointed arbitrators "to balance their accounts, and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house."

The arbitrators ordered the Defendant to pay 1*l.* 13*s.* 10*d.* in addition to the sum paid into court, and directed that each party should pay his own law expenses, together with the expenses of the arbitration.

Wilde Serjt. obtained a rule *nisi* for the prothonotary to tax the Plaintiff's costs upon his taking the money out of court.

Heath Serjt. on the part of the Defendant, resisted this, on the ground that, assuming the arbitrators to have had no authority to decide on the question of costs, still their award was not equivalent to a verdict, and, without a verdict, or an award for costs on a proper authority, the Plaintiff could not claim them. The submission, however, of all matters in dispute virtually included the question of costs, which the arbitrators had decided.

Wilde. The Plaintiff, when he takes the money out of court, is entitled to costs, at least up to the time when it is paid in; for he takes it out, not by virtue of the award, but because the Defendant, by paying,

Held, that a reference to arbitrators to balance accounts and settle all matters in dispute respecting the leaving and occupying of two corn-mills and a dwelling-house, did not authorize them to decide on the costs of an action for fixtures, at least up to the time of paying money into court, when the submission was entered into.

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admits it to be due: to that extent, therefore, he admits the action to be well founded. And the arbitrators had no authority to decide on the question of costs; for this was not a reference of the *cause*, or even of all matters in difference, but merely of the account between the parties.

TINDALL C. J. If I could perceive that this was a reference of the *cause*, I should be disposed to say, that the rule should be discharged. But I cannot see that the *cause* was referred, although the matters in difference were. If so, when money has been paid into court, and the Defendant, by the payment, admits he is wrong up to that time, it seems to me that up to that time the Plaintiff is entitled to his costs.

PARK J. concurred.

GASELEE J. The justice of the case, perhaps, accords with the decision which has been pronounced; but I think the law is the other way, considering this submission to be, in effect, a reference of the *cause*.

ALDERSON J. I think it may fairly be considered that the arbitrators had a power to decide as to the costs subsequent to the payment of money into court, but not before; and that agrees with the justice of the case.

Rule absolute for costs up to the time of paying the money into court.

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The Dean and Chapter of ELY v. CALDECOT.

May 12.

THIS was an action of *assumpsit*, brought to recover the amount of certain fines, alleged to be due from the Defendant upon his admission to certain copyhold premises. At the trial before *Alderson J.*, at the *Suffolk* Spring assizes, 1831, a verdict was taken for the Plaintiffs, damages 182*l.*, subject to the opinion of the Court on the following case: —

What evidence sufficient to establish a custom for the payment of a full fine by remainder-man upon admission to copyhold.

The Plaintiffs are lords of the manor of *Lakenheath*, in the county of *Suffolk*. By the custom of the manor, fines payable upon admission to lands, parcel of the manor, are arbitrary, but not exceeding two years' annual value of such lands. The father of the Defendant held certain premises, parcel of the said manor, as tenant for life thereof, under the will of the Rev. *John Barnes*, with remainder in fee to the Defendant. The father of the Defendant was admitted, under the said will, to the premises, at a court held the 14th of *October* 1818, to hold the same to him and his assigns for life, with remainder as in the will was mentioned; and paid a full fine upon such admission. After the death of the tenant for life, the Defendant, at a court held on the 19th of *May* 1828, was admitted in fee to the premises so devised to him by the will of the said *John Barnes*, in remainder after the decease of his father. In order to prove a special custom sufficient to warrant the claim of the Plaintiffs to a fine in this case, *Hugh Robert Evans* was examined on their part. He stated that he had acted as steward of the manor for thirty-five years, and that the custom of the manor was, for a tenant in remainder to pay a full fine upon his admission upon

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the death of tenant for life: but it appeared, upon his cross-examination, that his knowledge on that subject was derived entirely from an inspection of the different entries in the court rolls under his care, except that, during the time he had been steward, he had personal knowledge of two instances, and no more, of admissions of tenants in remainder after the deaths of tenants for life, namely, *Willett's* and *Payne's* admissions. Upon the former admission, namely *Willett's*, he received on the 3d of *October* 1808, on the admission of *Mary Willett*, for life, 39*l.* 10*s.*, and, on the 31st of *October* 1821, on the admission of *Anthony Willett*, the tenant in remainder upon the decease of the tenant for life to the same estate, 460*l.* 5*s.*, being, in both instances, full fines; and, in the latter case (*Payne's*), *Eliz. Payne*, on the 25th of *May* 1807, was admitted for life, and paid a fine of 20*l.* 4*s.* 3*d.*: and, at the same court, *Thomas Payne*, the remainder-man to the remainder expectant on her decease, was admitted, and paid 10*l.* 2*s.* 3*d.*; the former being a full, the latter a half fine. There was no evidence of reputation, or declarations by deceased tenants of the manor as to any such custom.

The following extracts from the court rolls were read in evidence on the part of the Plaintiff:—

17th of *October* 1735, *Frances Malt* admitted for life, under the will of *John Malt*, to a cottage: and she paid her fine.

10th of *October* 1737, *Frances Malt*, spinster, admitted in remainder in fee, on the death of the aforesaid *Frances Malt*, to the same cottage, under the same will: and she paid her fine.

11th of *May* 1737, *Mary Taylor* admitted for life, under the will of her mother *Mary Secker*, to a messuage, rent ; and twenty-two acres of land, rent : and she paid her several fines.

13th of *April* 1761, *Matthew Taylor* admitted in remainder

mainder in fee, on the death of the said *Mary*, to the same premises : and he paid his fine.

22d of *April* 1771, *William Newton*, and *Alice* his wife, admitted to them and the longer liver of them, and the heirs of the said *Alice*, under the will of *John Evans*, to a messuage, rent 2s. 1d.; and seven acres two roods of *fen*, rent 1s. ; and three acres and a half of *fen*, rent 1s. 9d. : and they paid their several fines.

25th of *May* 1807, *William Newton* admitted in fee, as eldest son and heir at law of said *Alice*, to same premises : and he paid his fine.

18th of *May* 1708, *Mary Roper* admitted for life, under the will of *John Roper*, to a messuage : *et fec. fin.*

27th of *April* 1721, *William Roper* admitted in remainder in fee to said premises, after the death of said *Mary Roper*, under the same will : *et fecit fin.*

3d of *October* 1808, *Mary Willett* admitted for life, under the will of *Anthony Willett*, with remainder over, as in the said will mentioned, to a large estate : and she paid her fine.

31st of *October* 1821, *Anthony Willett*, for life, under the same will, and after the death of the said *Mary Willett*, then late *Mary Murrell*, to the same estate, with the remainder over, as in the said will is mentioned : and he paid his fine.

29th of *April* 1730, *Elizabeth Holmes* admitted for life, under the will of her husband, *Christopher Holmes*, to a cottage, rent *l.*, and a piece of ground, rent *l.* : *et fecit sep. fin.*

10th of *April* 1744, *Elizabeth*, the wife of *Robert Holmes*, and daughter of the said *Christopher Holmes*, admitted in remainder in fee, on the decease of the said *Elizabeth Holmes*, to said cottage and piece of ground.

27th of *April* 1732, *Susannah Harding* admitted for

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life, under the will of her husband, *John Harding*, to three acres two roods of arable land, twenty acres in *New Fen*, and six acres in *Stallode*, a tenement, and four acres of *marsh*, called *Coat's House*: *et fecit sepel. fin.*

7th of *October* 1751, *Robert Harding* admitted in remainder in fee, after the death of *Susannah Harding*, his mother, to the above six acres in *Stallode*.

8th of *April* 1782, *Thomas Tunnell*, for life, under the will of *John Tunnell*, to a messuage, a messuage and yard, eight acres in *New Fen*, four acres in *White Fen*: and he paid his fine.

20th of *May* 1807, *Simeon Mary Stuart Tunnell* admitted in remainder in fee, on the death of said *Thomas Tunnell*, under the will of said *John Tunnell*, to said four acres in *White Fen*: and he paid his fine.

28th of *April* 1671, *Phillis Hanslip* admitted for life, under the will of *William Hanslip*, her husband, to one acre of arable land, in *Middle Field*, called *Butcher's Acre*, and three single half acres of arable land in *South Field*; and *John Hanslip* to the remainder in fee: *et admissi sunt inde ten. et sec. fin.*

24th of *April* 1695, *John Hanslip* admitted in fee in remainder, after the death of said *Phillis Hanslip*, under the said will, to same premises: *et sec. finem.*

4th of *October* 1734, *Hammond Eagle* admitted for life, under the will of *Edward Eagle*, to thirty-two acres of fen-land: and he paid his fine.

6th of *May* 1740, *Edward Eagle* admitted in fee, after the death of said *Hammond Eagle*, to the remainder, under the same will, to eight acres, part of said thirty-two acres: and he paid his fine.

25th of *May* 1807, *Elizabeth Payne*, for life, under the will of *Thomas Payne*, her husband, to a messuage and barn, and eighteen acres, one rood, and twenty perches of arable land: and she paid her fine. Same court,

court, said *Thomas Payne*, the son, admitted in remainder expectant on the decease of said *Elizabeth Payne*: and he paid his fine.

20th of *April* 1632, *Agatha Last* admitted, on the surrender of *John Last*, to the reversion, when it shall happen, after the death of *Alicia Morley*, of three roods of land in *Short Bryan*, and the reversion of thirty acres of arable land, late *Lincolns*; and the reversion of thirty acres of arable land, late *Bakers*; *et fec. sepal. fin. et de sepal. Rev. con. fidee.*

20th of *May* 1717, *John Lamming* and *Mary Roper*, his intended wife, admitted, on the surrender of said *John Lamming*, to fourteen acres of *marsh*, rent ; and to eight acres of marsh in *Stallode*; and half an acre of marsh in *New Fen*, to hold to said *John Lamming* and his heirs, until the solemnization of said intended marriage, with remainder to them for their natural lives, and the life of the longer liver of them, with remainder to the right heirs of the said *John Lamming*: *et fec. sepal. fin.*

23d of *April* 1711, *Thomas Hinson* and *Ann*, his wife, admitted for their lives, and the life of the longer liver of them; with remainder to *Thomas Hinson*, son of said *Thomas* and *Ann*, his heirs: *et fecer. fin. et admissi sunt.*

On the part of the Defendant the following extracts from the court rolls were also read in evidence:—

Anno 1626, *John Outlaw* and *Margaret*, his wife, surrender to the use of *Nicholas Outlaw* and *Helen*, his wife, for their lives, and the life of the survivor; and, after the decease of the survivor, to the use of *Thomas Morris*, his heirs and assigns. *Nicholas Outlaw* and *Helen*, his wife, thereupon admitted for life, and *Thomas Morris* remainder in fee. *Et dant. dmo. de fine.*

Anno 1633, *Richard Whistler*, senior, and *Alice*, his

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wife, admitted for life; and *Richard Whistler*, junior, and *Bridget*, his wife, to the remainder in fee: *et admissi sunt inde tenentes, et fecerunt dmo. finem.*

Anno 1641, *Elizabeth Spicer* admitted for life; *William Spicer* to the remainder in fee: *et admissi sunt inde tenentes, et fecerunt dmo. finem.*

Anno 1662, *Mary Fuller* admitted for life; *John Furman* to the remainder in fee: *et admissi sunt ind. tenen. et fec. finem.*

Anno 1671, *Phillis Hanslip*, under will of *William Hanslip*, admitted for life; *William Hanslip*, the son, to the remainder in fee: *et admissi sunt inde tenen. et fec. finem.*

Anno 1762, *Mary Morley* admitted for life; *Edmund Morley* to the remainder in fee: *et admissi sunt inde tenen. et fecerunt finem.*

Anno 1709, *Robert Secker* and *Maria Secker* admitted for life; and *Jane Secker* to remainder in fee: *et admissi sunt inde tenentes, et fecer. fin.*

Anno 1790, *Elizabeth Gathercole* admitted, under the will of *John Gathercole*, for life; *Ayn Gathercole* to remainder in fee: and they paid their fine.

Anno 1702, *William Fuller* admitted, on surrender of *Samuel Hall*, to eight acres of fen, or marsh ground, to use of said *William Fuller* and his assigns, during the term of his natural life; and from and after his decease, to the use of *Thomas Fuller*, his son: *et fec. fin.*

Anno 1738, presented that the last-named *Thomas Fuller* died seised of said premises, and that *Thomas Fuller* was his eldest son and next heir; who was thereupon admitted, and paid his fine.

4th of October 1818, *John Caldecott* admitted, under the will of the Rev. *John Barnes*, to hold unto the said *John Caldecott* and his assigns, for and during his life, with remainder as in the said will is mentioned: and he paid his fine.

It

It was agreed that the Court should be at liberty to draw any conclusion of fact as to the existence or non-existence of any special custom within the manor; and of the extent of such special custom as they might think the jury ought to have drawn.

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Storks Serjt. for the Plaintiff. By special custom a full fine may be claimed for the admission of a remainder-man, in addition to the fine for the particular tenant. *Whitbread v. Jenny.* (a) And there is sufficient evidence in this case to shew the existence of the custom in the manor of *Lakenheath*; for there are many instances of fines paid by remainder-men, and it is an inference of law, that where parties pay a fine, they pay a full fine. Where there is no custom, the admittance of tenant for life is the admittance of him in remainder. *Tipping v. Bunning.* (b) The entries, therefore, of admissions of so many remainder-men is conclusive to shew the existence of the custom, the fine due to the lord being payable after admittance. *Rex v. Hendon* (c), *Graham v. Sime* (d), *Hobart v. Hammond.* (e) A single instance, however, is sufficient to establish such a custom. *Doe v. Mason* (g), *Bennet v. Jeffery.* (h) The Plaintiffs, therefore, having claimed their fine under the special custom, and the inference being, that upon payment of fines by remainder-men, the whole that was due was paid, it is for the Defendants to shew that payment to such extent did not take place.

Wilde Serjt. *contra.* What shall be the effect of admittance to a copyhold, and the amount of fine, if any, to be paid thereon, must depend upon the custom of

(a) 5 East, 522. 1 Bac. Abr.

735.

(b) Moor. 465.

(c) 2 T. R. 484.

(d) 1 East, 631.

(e) 4 Rep. 28. a.

(g) 3 Wils. 63.

(b) 2 M. & S. 92.

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each manor. *Co. Copy.* 94. A fine, such as that claimed by the Plaintiffs, can only be payable by a special custom, and not by the general law of copyholds. 1 *Cruise*, 312. par. 10. 13. *Whitbread v. Jenny*. But a special custom being in the nature of an exception, it lies on the Plaintiff to establish its existence, and that, by conclusive proof; for customs in favour of the copyholder are construed liberally; customs in favour of the lord, strictly. *Watk.* 60. Now a fine is not necessarily payable on every admittance; *Barnes v. Corke* (a); nor is it to be inferred, that, wherever a fine is paid, it is a full fine. The fine for a remainder-man, where there is a custom for him to pay, is usually half the full fine. 1 *Watk.* 481. And the lord, in such a case, may apportion the fine between the tenant for life and the remainder-man; may exact the whole from the tenant for life; or allow the remainder-man to pay his share when he comes into possession. *Blackburne v. Graves* (b), *Brown's case* (c), *Tipping v. Bunning*. The evidence in this case is not sufficient to establish the custom set up. The entries of most of them are equivocal; there is no entry of a full fine for a remainder-man, or of the word *finis* in the plural.

Storks, in reply, examined the various entries in detail, and contended that several of them established the payment of a full fine by the remainder-man.

Another point was argued as to the necessity of estimating the value of the land, subject to an allowance for the fen taxes; but, as the Court gave no opinion on that question, the portion of the case which relates to it is omitted.

Cur. adv. vult.

(a) 3 *Lev.* 308.

(b) 1 *Mod.* 120. 1 *Ventr.* 260.

3 *Keb.* 263.

(c) 4 *Rep.* 21.

TINDAL C. J. In this case, which was argued before us in the last term, the facts were as follows:— The Plaintiffs were lords of the manor of *Lackenheath*, in the county of *Suffolk*; and the premises in respect of which the question arose were copyhold, and holden of that manor. By the will of the Rev. *John Barnes* these premises were devised to the father of the Defendant as tenant for life, with remainder to the Defendant in fee; and, on the death of *Barnes*, the Defendant's father was duly admitted as tenant for life, "with remainder as in the said will is mentioned;" and, on that occasion, he paid a full fine of two years' improved value, the fines being, according to the custom of that manor, arbitrary. On the death of his father, the Defendant was admitted as tenant in fee to the same premises, and the Plaintiffs claimed another full fine on that occasion. Upon the trial, it appeared that all the evidence applicable to this subject was of a documentary nature, and it was, therefore, agreed by both parties to state that evidence for the opinion of this Court in the form of a special case, referring it to the Court to find such conclusions of fact as they might think the jury, properly directed, ought to have found at the trial, and thereupon to give such judgment as in point of law ought to follow.

We have duly considered the above facts submitted to us, and have arrived at the conclusion that the verdict should be entered for the Defendant.

It is conceded, on the part of the Plaintiffs, that unless they are entitled to claim a full fine on the admittance of the Defendant, they cannot succeed. The question, therefore, is, whether they have affirmatively established that point. In order to do this, it is necessary that they should shew a special custom for that purpose. That this is the law is clear from several authorities. In *Barnes v. Corke* it is laid down, on argument by the

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two Judges in Court, "that no fine was due on the admittance of a remainder-man after admittance and payment of a fine by the tenant for life, unless there be a special custom for it, but that the admittance to the particular estate was an admittance to the remainder; and that which was said in 4 *Rep.* 22 *b.* 'that it shall not be to the prejudice of the lord in respect of his fine,' is to be intended where a fine is due by custom for an admittance of the remainder-man; but, without a special custom, none is due." And for this position various authorities are there cited. Indeed, in referring to 4 *Rep.* 22 *b.*, it appears to have been so laid down in terms by Lord *Coke*; for he says that "the admittance of the tenant for life is the admittance of him in remainder to vest the estate in him, but shall not bar the lord of his fine, which he ought to have *by the custom.*" (See also 23 *a.*) And he puts the tenant in remainder, in such a case, upon the same footing as the heir, who, though he is in by the admittance of his ancestor, may nevertheless be compelled to come in and be admitted, in order that the lord may have his fine, due by the custom of the manor, upon the descent. It should seem, therefore, that Lord *Coke* himself puts it on the custom; but, in *Blackburne v. Graves*, it is very distinctly laid down by Lord *Hale*, who, after stating that he did not see any inconvenience why the admittance of tenant for life or years should not be the admittance of all in remainder, for fines are to be paid notwithstanding by the particular remainders, adds afterwards, "It shall not prejudice the lord; for, if a fine be assessed for the whole estate, there is an end of the business: but if a fine be assessed only for a particular estate, the lord ought to have another." The law, as thus laid down by Lord *Hale*, appears to us to explain and reconcile all the dicta on this subject, by distinguishing between those where

where the Judges, in speaking of a *fine*, must be understood as meaning a full fine; and others where, in using the same expression, they only mean an apportioned part of the full fine. It explains also all the instances of admittances, with exception of one, which are to be found in the statement of this case.

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The first four instances of *Malt*, *Taylor*, *Newton*, and *Roper* are quite consistent with the idea that, in those cases, the tenants for life on their admittance paid a fine only for their particular estates, and the tenants in remainder another on their subsequent accession to the tenancy and admittance. The same observation applies to the cases of *Holmes*, *Harding*, *Tunnell* and *Eagle*. On the other hand, in the cases relied on by the Defendant, of *Outlaw*, *Whistler*, *Spicer*, *Fuller*, *Morley*, *Secker*, and *Gathercole*, where both tenants for life and in remainder are admitted at the same time, and pay their fine, it is not at all improbable that the fines were there assessed for the whole estate, and that there was in those cases, as Lord *Hale* expresses it, "an end of the business;" for we find in the manor-books no further admittance of the tenants in remainder in those cases. The case of *Hanslip* is probably inaccurate in some respects. It appears, that although in 1671 *John Hanslip*, the son, was actually admitted to the remainder in fee at the same time that his mother was admitted for life, yet he was afterwards admitted a second time in 1695, upon her death, and paid a fine. Probably, however, this was really the case of an apportionment of the full fine, in 1671, between the tenant for life and the tenant in remainder; and, the part of the fine due from the tenant in remainder not having been then paid by him, he was, in 1695, called upon to be admitted, in order that his apportioned fine might be paid to the lord. These cases being thus disposed of, there remain only two instances to be considered, that of *Payne*, in 1807, and
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Willett, in 1821. The former is inapplicable to the present question, for the special custom, if any, which it is calculated to establish, is not the one now relied on by the Plaintiffs; and as to the case of *Willett*, although it is an instance expressly in point, yet it is much too recent, even if unopposed by other instances, to be the foundation of a claim like the present on the part of the Plaintiffs. But we also think that it is very difficult to reconcile this instance with the case of *Fuller*, adduced on the behalf of the Defendant. There *William Fuller*, in 1702, is admitted, on a surrender by *Hall*, to eighteen acres of *fen*, to the use of the said *W. Fuller* and his assigns for life; and, after his death, to the use of *Thomas Fuller*, his son, in fee. Now *Thomas Fuller*, the son, does not appear ever to have been admitted or paid any further fine to the lord; for the next admittance to be found on the books is in 1738, being that of *Thomas Fuller*, the grandson of *William Fuller*, as heir to his father, *Thomas Fuller*, who died seised of the premises. It appears, therefore, that *Thomas Fuller*, the father, was considered as admitted under the original admittance, in 1702; for there is no trace of any other admittance of him, or of any fine subsequently paid by him. Upon the whole, therefore, we are of opinion that, if these different instances had been brought before a jury, and properly commented on by the Judge at *Nisi Prius*, they ought by their verdict to have found, that no special custom for taking one full fine on the admittance of tenant for life, and another full fine on the admittance of the tenant in remainder, was affirmatively proved on the part of the Plaintiffs. And as the law appears to be clear (and, indeed, was admitted so to be on the argument of this case) that, without such special custom, no such fine would be claimable, we are of opinion that the verdict ought to be entered for the Defendant. The present decision of the Court on this point

point makes it unnecessary to give any opinion on the other point made in the course of the argument, as to the drainage tax.

Postea to the Defendant.

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GARTH v. HOWARD and FLEMING.

May 11.

DETINUE for plate. Plea, general issue. At the trial before *Tindal* C. J., it appeared that *Howard* had, without authority, pawned, for 200*l.*, certain plate belonging to the Plaintiff. The Defendant, *Fleming*, was a pawnbroker; but the only evidence to shew that the plate had ever been in his possession, was a witness, who stated that, at the house of the Plaintiff's attorney, he heard *Fleming's* shopman say that it was a hard case, for his master had advanced all the money on the plate, at 5 per cent.

The declarations of a shopman are not evidence against his employer, unless made in the course of his employer's business.

This evidence being objected to, was received, subject to a motion to this Court; and a verdict having been given for the Plaintiff,

Andrews Serjt. obtained a rule *nisi* for a new trial, on the ground, among other objections, that the declarations of an agent can only be received in evidence when they have been made in the ordinary course of his employer's business; and that it is not in the course of a pawnbroker's business to lend 200*l.* on a single pledge, or at 5 per cent. interest.

Spankie Serjt. shewed cause. The declaration of the shopman was made in the ordinary course of his employer's business; for that business was to lend money
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on pledges, and the amount of the pledge, or of the interest paid, are immaterial. Now it is established by *Rex v. Almon* (a) that the law presumes a master to be acquainted with the acts of his servant in the course of his business; and slight evidence is sufficient to establish the fact of agency. *Hazard v. Treadwell*. (b) The declarations of *Fleming's* shopman, therefore, being within the scope of his authority, — *Schumack v. Lock* (c), — are conclusive against his employer.

Andrews The business, which *Fleming's* shopman is alleged to have spoken to was, in effect, a private loan, and not the transaction of a pawnbroker's shop. It is inexpedient to extend the exception by which the declarations of agents are received in evidence on hearsay; and in *Maesters v. Abraham* (d), Lord *Kenyon* refused to admit even the letter of an agent as evidence of an agreement by his principal. Such evidence, if received, ought at least to be confined to declarations at the time of the transaction. In *Helyear v. Hawke* (e) it was expressly determined that the principal is not bound by the representation of the agent at another time.

Cur. adv. vult.

TINDAL C. J. The rule in this case has been obtained upon two distinct grounds; but is unnecessary to give an opinion upon any other than this, namely, whether the declaration of the shopman of the Defendant *Fleming*, that the goods were in the possession of his master, was admissible: for it is clear that, unless *Fleming* is to be affected by such declaration, he is entitled to the verdict upon the general issue, *non*

(a) 5 Burr. 2686.

(b) 1 Str. 506.

(c) 10 B. Moore, 39.

(d) 1 Esp. 375.

(e) 5 Esp. 74.

detinet.

detinet. If the transaction out of which this suit arises had been one in the ordinary trade or business of the Defendant as a pawnbroker, in which trade the shopman was agent or servant to the Defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an enquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the Master of the Rolls in the case of *Fairlie v. Hastings* (a), which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with *Fleming* appears to us, not a transaction in his business as a pawnbroker, but was a loan by him as by any other lender of money at 5 per cent. And there is no evidence to shew the agency of the shopman in private transactions unconnected with the business of the shop. I doubted much at the time whether it could be received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the Court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account.

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(a) 10 Ves. 128.

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Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case appears to us to exceed those limits, we think there ought to be a new trial.

Rule absolute.

May 12.

MARGETSON v. WRIGHT.

1. Some splints cause lameness, others do not; a splint, therefore, is not one of those patent defects against which a warranty is inoperative.

2. The Defendant having warranted a horse sound *at the time of the contract*, and the horse having afterwards become lame from the effects of splint visible when the Defendant sold him, Held, that the Defendant was liable on his warranty.

THE Defendant sold the Plaintiff a race-horse called *Sampson*, which he warranted sound, wind and limb, *at the time of sale*. Some time after the sale, the horse became lame: whereupon the Plaintiff sued the Defendant upon his warranty, and obtained a verdict.

It appearing, however, that the subsequent lameness was occasioned by a splint, the existence of which was known to the Plaintiff at the time of the sale, the Defendant obtained a rule absolute for a new trial. See *ante*. (a)

Upon the second trial, the Plaintiff gave evidence as to the nature and consequences of various kinds of splints; that a splint may or may not be the efficient cause of lameness, according to the position which it occupies, and its size or extent; and that *Sampson's* splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness.

The jury again found a verdict for the Plaintiff; when the learned Judge who presided (*Vaughan B.*), requesting them to tell him distinctly, whether, in their

(a) 7 *Bingh.* 603.

judgment, the horse was sound; or, if unsound, whether the unsoundness arose from the splint of which evidence had been given; the jury said, "that although the horse exhibited no symptoms of lameness when the contract was made, he had upon him at the time of the contract, the seeds of unsoundness arising from the splint." Whereupon

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Wilde Serjt. obtained a rule *nisi* for a new trial, upon the ground, that upon this special finding, the learned Baron ought to have directed a verdict for the Defendant, the Defendant having limited his warranty to the time of sale, for the express purpose of exempting himself from liability for the consequences of a splint visible to all who inspected the horse. If, therefore, there were no symptoms of lameness when the contract was made, the Defendant's warranty was satisfied.

Spankie Serjt. shewed cause. As the Plaintiff could himself have ascertained whether or not the horse was lame at the time of the contract, the warranty would have been useless and unmeaning if it did not imply that, at the time of the contract, the horse was exempt from any infirmity which might occasion subsequent unsoundness. Now he was not so exempt: for he had a splint, which turned out to be the cause of the subsequent unsoundness. And a splint is not one of those patent defects, such as blindness or broken knees, on the subject of which a warranty is inoperative; for it is only by the event that it can be ascertained whether the splint is or is not of a mischievous nature. It was a defect, therefore, against the consequences of which the Defendant might give a warranty; *Liddard v. Kain* (a); and the object of the warranty was to assert that this was an innocent splint.

(a) 2 Bingh. 183.

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Wilde. From the finding of the jury, it appears that the mischief of a splint must depend chiefly, if not entirely, upon its position: if so, the possibility of its becoming mischievous was a patent defect, of which the Plaintiff had the means of judging as well as the Defendant. Taking it, however, as only an equivocal indication of unsoundness, the uncertainty as to its future effect was the very point on which the Defendant proposed to guard himself by limiting his warranty to the time of the contract. But for the uncertain issue of the splint he might have given an unqualified warranty: and he derives no benefit from the limitation, if it be not held to be satisfied by the fact that the horse had no symptoms of lameness when the contract was made.

Cur. adv. vult.

TINDAL C. J. This was an action upon a warranty, in which the Defendant warranted the horse to be sound, wind and limb, "at this time;" that is, at the time of the warranty made. The jury at the trial found a verdict for the Plaintiff. The learned Judge requested the jury to tell him distinctly whether, in their judgment, the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint of which evidence had been given. In answer to which enquiry the jury said, "That, although the horse exhibited no symptoms of *lameness* at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint." The question upon this application for a new trial is, Whether this finding of the jury sanctions the verdict for the Plaintiff or not; that is, whether the Court can see with sufficient clearness that the jury thought that the horse was unsound at the time of the contract, and consequently that the warranty was broken. It appears that the evidence before the jury was, in substance, that a splint might or might

might not be the efficient cause of lameness, according to the position which it occupied, and its size and extent; that this splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness. The jury, therefore, drawing their attention to the particular splint, to which the evidence related, appear to us to have intended that this individual splint, though it did not at the moment produce lameness, was, at the time of the contract, of that sort and in that situation as to contain, in their language, the seeds of unsoundness, that is, the efficient cause of the subsequent lameness. If the lameness complained of had proceeded from a new or different splint, or from the old splint taking a new direction in its growth, so as to affect a sinew, not having pressed on one before, such a lameness would not have been within the warranty, for it would not have constituted a present unsoundness at the time of the warranty made. But the jury find that the very splint in question is the efficient cause of lameness. On the former motion, our attention was not called to any evidence, if any such was given, as to the different nature and consequences of splints which the learned Judge reports to have been given upon the present occasion; but it now appears that some splints cause lameness, and others do not, and that the consequences of a splint cannot be apparent at the time, like the loss of an eye or any visible blemish or defect, to a common observer. We therefore think that, by the terms of this written warranty, the parties meant this was not a splint at that time which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the warranty was broken, and that the *postea* must be delivered to the Plaintiff.

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Rule discharged.

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KINGSFORD v. MARSHALL.

Upon the ebbing of the tide, a vessel took the ground in a tide harbour, in the place where it was intended she should; but, in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged: Held not a stranding for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded.

THIS was an action on a policy of insurance on wheat on board the ship *Lady Anne*, at and from *London to Dunkirk*. The policy contained the usual memorandum, by which corn, &c. was warranted free from average, unless general, or the ship be stranded. The Plaintiff declared for an average loss upon the wheat by the stranding of the ship. At the trial before *Tindal C.J.*, *London* sittings after last *Michaelmas* term, the only question that arose was, whether there was a stranding of the ship or not? As to which, the facts were as follow:—*Dunkirk* harbour is a tide harbour, being nearly dry at low water. The ship entered the harbour about the time of high water, and was moored fore and aft to the shore, by order of the harbour master, in a place pointed out by him, where other vessels had been moored; and was also fastened by a running tackle from the mainmast head to a post on the shore, for the purpose of preventing the ship from settling over as the tide fell. Whilst the tide was ebbing, and before the ship took the ground, though as to the precise time there was contradictory evidence, the rope of the running tackle broke; and after the ship had settled, it was discovered, that, in taking the ground, she had struck against some hard substance, by means of which two holes were made in the bottom of the ship, in the second or third streak from the keel, and the water flowing through these holes had injured the ship, and also done considerable damage to the cargo. Upon the fact, whether the ship took the ground precisely in the place and in the manner she would have done, if no accident had happened to the rope, there was contradictory evidence: and the jury were directed, that if the ship

ship took the ground merely in consequence of the ebbing of the tide, and at the very place where it was intended she should at the time she was moored, then there was no stranding within the meaning of the policy; but if, in consequence of the breaking of the rope, or any other casualty, the ship took the ground, not in the place where it was intended she should settle by the ebbing of the tide, but in some other and different place, then there was a stranding. The jury found for the Defendant; thereby, in effect, declaring that the ship had taken the ground merely through the ebbing of the tide, and in the very place where it was intended she should, and negating that from the breaking of the rope, or any other accident, she had settled in a different place.

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Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground of an alleged misdirection, contending that in cases of this kind, the question is, whether or not the loss takes place in the ordinary course of navigation: that this loss did not take place in the ordinary course of navigation; for though it was in the ordinary course that a vessel should take the ground in *Dunkirk* harbour, it was not in the ordinary course that she should settle down upon a large stone which should perforate her bottom. The jury, therefore, should have been told that this was a stranding for which the underwriter was responsible. Thus, in *Fletcher v. Inglis* (a), where a transport in government service, insured for twelve months, was ordered into *Boulogne* harbour, the bed of which is hard and uneven, and, the tide having left her, received damage by taking the ground; it was held, that that was a loss by the peril of the sea. So, in *Rayner v. Godmond* (b), in the course of a

(a) 2 B. & Ald. 315.

(b) 5 B. & Ald. 225.

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voyage along a canal, it became necessary, in order to repair the canal, to draw off the water; the ship, having been placed in what appeared to be a safe situation when the water was drawn off, impinged by accident upon some piles, the existence of which was not previously known: and this was held to be a stranding within the usual memorandum in the policy.

Wilde and *Stephen Serjts.* shewed cause in *Hilary* term. This was a stranding in the ordinary course of navigation, for which the underwriter is not responsible; and *Hearne v. Edmunds* (a) is in point. There, a vessel in charge of a pilot, going up *Cork* harbour, took the ground in the ordinary course of navigation, and afterwards, when moored at a quay, on the ebb of the tide took the ground, fell over on her side, and was injured; and it was holden, that that was not a stranding, for which the insurer was liable.

In *Fletcher v. Inglis* the loss was not occasioned by the vessel's taking the ground, but by succussion on the reflux of the tide; to which she could not have been exposed unless placed in an improper position. In *Raymer v. Godmond*, the accident did not happen in the ordinary course of navigation, for the drawing off the water of the canal for repairs was obviously an unusual occurrence.

In *Carruthers v. Sydebotham* (b), a ship being under conduct of a pilot was, against the advice of the master, fastened at the pier of the dock basin at *Liverpool*, by a rope to the shore, and left there; when the tide retired she fell over on her side and bilged: that was held a stranding, for which the underwriters were liable. But the fact that the vessel was placed, contrary to the advice of the master, in a position which proved fatal to

(a) 1 B. & B. 388. From it appeared that the bottom of Lord C. J. *Dallas's* notes of the *Cork* harbour is hard and stony.
 trial, which *Wilde* now produced, (b) 4 M. & S. 77.

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her, establishes that such position was not taken in the ordinary course of navigation.

In *Barrow v. Bell* (a), a ship, in entering a harbour, struck upon an anchor, and being thereupon in danger of sinking at her moorings, was warped higher up the harbour, where she took the ground, and remained fast: this was also held to be a stranding within the meaning of the policy; but the blow which rendered the stranding fatal, was given by the anchor before the vessel took the ground. In *Bishop v. Pentland* (b), where the ship was compelled to put into a tide harbour, and was there moored alongside a quay, in the usual place for ships of her burden, it became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her; and the rope with which she was so fastened, not being of sufficient strength, broke when the tide retired, and the vessel fell over upon her side, which was thereby stove in: this was held to be a stranding. But the damage was manifestly occasioned by the negligence of the crew, and not in the ordinary course of navigation.

In the present case, the jury having found that the accident was not occasioned by the insufficiency of the rope, the stranding could only have occurred in the ordinary course of navigation at *Dunkirk* harbour.

Taddy. In the ordinary course of navigation at *Dunkirk* harbour, vessels are compelled to take the ground; but they would not enter and do so if the practice exposed them to destruction or injury; the fact, therefore, that all vessels take the ground there, conclusively shews, that it is not in the ordinary course of navigation that they should be bilged in so doing. The

(a) 4 B. & C. 736.

(b) 7 B. & C. 219.

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injury occasioned by the stone, in this case, was as much out of the usual course, as the injury occasioned by the sunken anchor in *Barrow v. Bell*, or the hidden piles in *Rayner v. Godmond*. Though the taking the ground was contemplated by both parties to the insurance, the accident which occasioned the injury was unforeseen, and comes therefore within the scope of the insurance. In *Carruthers v. Sydebotham*, the insurers were held responsible, because, in the judgment of the master, the ship had been placed by the pilot in an improper position: and such was the case here; for the harbour-master, not the captain, stationed the vessel where the accident happened. The jury, therefore, should have been directed that this loss occurred, not by such by a stranding or taking the ground as the parties contemplated, but by an unforeseen accident, the consequence of which was a stranding for which the underwriter was responsible.

Cur. adv. vult.

TINDAL C. J., (after stating the facts as above,) proceeded;—A rule has been obtained for a new trial, upon the ground of a misdirection to the jury; but after hearing the argument of counsel against and in support of the rule, we think, upon those facts, the direction of the Judge, and the finding of the jury, was right, and that a new trial ought not to be granted. That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbour, would be a damage recoverable on a policy on ship, or a policy on goods not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt. But the question is, whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum, by reason of the ship being stranded; inasmuch as it has long been settled

settled that the words "if the ship be stranded" are words of condition, and that if such condition happens, it destroys the exception and lets in the general words of the policy. (See *Burnett v. Kensington*. (a)) In considering this case, therefore, it will be better to treat the fact, that the damage to the wheat was occasioned by the very act of the ship's taking the ground, as a circumstance altogether immaterial in the determination of the question. For if the ship was *stranded* in *Dunkirk* harbour, an average loss upon the whole would be equally recoverable, though it had happened from perils of the sea at any former time, or any other place in the course of the voyage insured. In this point of view it is of very great consequence that the meaning of the word *stranding* should be distinctly understood. Now it is perfectly clear, and has been settled by various decided cases, that by the term "stranding," neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say, that when a vessel, in the course of a voyage insured, is sailing in a tide river, or puts into a tide harbour, the taking the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding, within the meaning of the policy. Otherwise, at every ebb of the tide, there would be a stranding; and the memorandum intended for the security of the underwriter against partial losses upon perishable commodities, would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason of the ship discharging her cargo in a tide harbour. The mere taking of the ground, therefore, in a tide harbour, in the place in-

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(a) 7 T.R. 210.

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tended by the master and crew, or the proper officers of the harbour, cannot, upon any principle of construction or common sense, be held to constitute a stranding. What more, then, is necessary? We think a stranding cannot be better defined, than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause. Such was the case in *Carruthers v. Sidebottom* (a), where the ship was taken by the pilot who had her in charge, against the direction of the master, and moored in an improper place. Such, also, was the case in *Barrow v. Bell* (b), where, the vessel having struck on an anchor, whereby she sprung a leak, and being in danger of sinking, was, in consequence, warped further up the harbour of *Holyhead*, where she took the ground. Such, again, was the case of *Bishop v. Pentland* (c), where, the ship having entered a tide harbour by stress of weather, was moored, fore and aft, with the addition, as in the present case, of a tackle from her mainmast, fastened to posts on the pier to prevent her falling over. The rope, being of insufficient strength, broke, and by means thereof the ship fell upon her side, whereby she was stove in and injured. Such, lastly, was the case of *Wells v. Hopwood*, very recently decided in the King's Bench, in which case the ship, having arrived in *Hull* harbour, was in the course of discharging her cargo at a quay alongside of which she was moored. At low water she grounded on the mud; but on one occasion, the rope by which her head was moored to the opposite side of the harbour stretched,

(a) 4 M. & S. 77.
 (b) 4 B. & C. 736.

(c) 7 B. & C. 219.

and

and the wind blowing from a particular quarter, instead of grounding entirely on the mud, as it was intended she should have done, she partly grounded on a bank of rubbish and stones. This grounding was held, by a majority of the Judges, to be a stranding within the meaning of the policy. Now, all these cases were decided upon the principle, that the taking the ground was occasioned by some extraneous and accidental cause; and was not a taking of the ground in the usual course of navigation. We think the attention of the jury, in the present case, was called to the very point to which it ought to have been directed, viz. whether the grounding was such as the master and crew intended, that is, merely by the ebbing of the tide, in the ordinary course of navigation; or, whether the grounding in the particular spot where she took the ground, was the effect of accident. Upon the facts before them, we think the jury found a right verdict; and, therefore, the *postea* should be delivered to the Defendant.

Rule discharged.

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REGULÆ GENERALES.

IT IS ORDERED, That the days between *Thursday* next before, and the *Wednesday* next after, *Easter* day, shall not be reckoned or included in any rules or notices or other proceedings, except notices of trial and notices of enquiry, in any of the courts of law at *Westminster*.

TENTERDEN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. BOSANQUET.
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

IT IS ORDERED by the Court, That after the *postea*s and inquisitions have been left with the clerk of the judgments, conformably with the rule of court made in *Trinity* term, 13 G. 2., it shall be lawful for the clerk of the judgments to permit the same to be taken out of the office for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution. AND IT IS HEREBY FURTHER ORDERED, That the attorney or agent, who procures such *postea*s or inquisitions from the office of the clerk of the judgments, shall cause the same to be returned again to the same office during the office hours of that day.

N. C. TINDAL.	S. GASELEE.
J. A. PARK.	E. H. ALDERSON.

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MEMORANDA.

In the course of the vacation, *John Gurney*, Esquire, king's counsel, and *John Taylor Coleridge*, Esquire, were called to the degree of the coif, and gave rings with the following motto:— *Justo secernere iniquum*.

J. Gurney, Esquire, was afterwards appointed one of the Barons of his Majesty's Court of Exchequer, in the room of Mr. Baron *Garraw*, who resigned, and received the honor of knighthood.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

AND THE VACATION ENSUING,

In the Second Year of the Reign of WILLIAM IV.

Ex parte CHUCK, in the Matter of STARKEY and
WHITESIDE, Bankrupts.

May 10.

IN *July* 1820, and for some time previous, *John Cross* In *July* 1820
Starkey and *William Starkey* carried on business in *W.* advanced
partnership as brewers; when, upon the sum of 24,000*l.* to *S.* and *S.*,
being advanced to them by *Whiteside*, then a minor, then carrying
they all three executed a deed, by the express terms on business in
partnership as
brewers, the
sum of
24,000*l.*, and all three executed a deed, by the express terms whereof a partnership
stock was created, in which they had all a joint property; *W.* however was not to
have any definite aliquot proportion of the profits, but was to have an account of the
profits as between themselves, so as to get 2000*l.* or 2400*l.* a year, as the case might
be, out of the clear profits: *W.*'s name never appeared to the world as a partner:
Held, that *W.* was a partner; and the new firm having become bankrupt in 1826,
held, that the creditors of the old firm and the creditors of the new firm were both
entitled to prove against the property of the new firm.

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whereof a partnership stock was created, in which they had all a joint property; *Whiteside*, however, was not to have any definite aliquot proportion of the profits; but was to have an *account* of the profits, as between themselves, so as to get 2000*l.* or 2400*l.* a year, as the case might be, out of the clear profits.

This deed was confirmed by *Whiteside* in *March* 1821, after he came of age, but his name never appeared to the world as a partner.

In 1826 the *Starkies* became bankrupt; whereupon a question arose, first, whether *Whiteside* was to be considered a partner; and, secondly, admitting him to be a secret partner, whether persons who were creditors of the old firm, had, not only a claim against all the property of the new firm, but also a right to prove their debts, to the exclusion of the creditors of the new firm, on the ground, that under the new firm the *Starkies* were the *apparent* or *reputed* owners of the whole property, within the meaning of the statute 6 G. 4. c. 16. s. 72., having in their possession, order, and disposition, the property of *Whiteside*, and with his consent. (a)

At the request of the Lord Chancellor, *Tindal* C. J. and *Littledale* J. assisted in the decision of these questions (b), and their united opinion was delivered as follows, in the Court of Chancery, by

TINDAL C. J. The first question to be considered is, Whether *William Whiteside* ever became a partner with *John Cross Starkey* and *William Starkey*, either as between themselves, or with prospect to third persons; that is, whether there was ever any joint partnership stock belonging to all these three persons. And we are of opinion, that by the deed of *July* 20th, 1820, con-

(a) See *Ex parte Jennings*,
1 Mont. 25. S. C.

(b) For the argument see
1 Mont. & Bligh. 364.

firmed by that of *March* 2d, 1821, which was executed after *Whiteside* came of age, *Whiteside* did become a partner with the two *Starkies*, both as between themselves, and also with regard to third persons; that by the express terms of the deed of *July* 20th, 1820, there was a partnership stock created, in which they had a joint property; that, although *Whiteside* had not any definite aliquot proportion of the profits, yet that he was entitled to an account of the profits as between themselves, so as to get his 2000*l.* or 2400*l.* a year, as the case might be, out of the clear profits; that he was, to all intents and purposes, a partner, though his name did not appear to the world; and that a joint commission against all the three, as such joint partners, might be well supported. *Whiteside*, then, being thus a partner, but unknown as such to the world, any creditor of the three might, at his election, have maintained an action either against the two *Starkies*, the known partners, or against them and *Whiteside* jointly, as appears by the case of *De Mautort v. Saunders* (a), *Ex parte Hamper* (b), and *Ex parte Norfolk* (c); and if an action had been brought against the three partners, it is clear that the joint effects of the partnership might have been taken in execution. So also, generally speaking, the joint effects of the partnership would be distributable amongst the joint creditors, under a joint commission of bankruptcy against the three. And unless there be something particular in this case to vary it from such general principle, we should be of opinion that the joint creditors of the three are entitled to have the partnership effects divided amongst them. Thus then stands the claim of the joint creditors of the three partners.

The claim of the creditors of the two *Starkies* under the old partnership, must next be considered. It is

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(a) 1 B. & Adol. 398.

(c) 19 Ves. 455.

(b) 17 Ves. 403.

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contended, on the part of those creditors, that after the partnership with *Whiteside*, who was a secret partner, the two *Starkies*, with the consent and permission of *Whiteside*, who had a share of the joint property, had his interest in such joint property in their possession, order, and disposition, and were reputed owners thereof, and took upon them the sale, alteration, and disposition as owners; and that, under the 6 G. 4. c. 16. s. 72., which follows 21 Jac. 1. c. 19. s. 11., they are entitled to have the benefit of that interest of *Whiteside* under the commission. And for that doctrine they rely on the case *Ex parte Enderby* (a), which, they contend, must be taken now to be the law on the subject, and to have settled all the former conflicting cases. To the authority of that case we certainly subscribe. In that case, indeed, the partnership had expired by effluxion of time before the commission issued; in the present case it continues up to the date of the commission; but we cannot think that circumstance makes any difference in principle between the two cases; and in the present instance, if *Whiteside* had been solvent and able to pay all the creditors of the three, and a commission of bankrupt had issued against the two *Starkies*, we do not think that he could have claimed to be entitled to his share of the joint effects any more than *Enderby* could in his case. It may be argued, however, that the rule of law laid down in that case may well apply against the solvent partner himself, who is in default, by suffering his share to remain in the possession and order of the bankrupt, and who, therefore, is excluded by the policy of the law from claiming any thing to the prejudice of creditors whom he may have been, in part, the means of misleading, but that it forms a very different question whether the same rule should be allowed to hold where the

(a) 2 B. & C. 389.

interest of the *creditors* of *Whiteside* is affected by its application, and where, as in the present case, the creditors of the three have trusted the firm when *Whiteside's* 24,000*l.* formed part of the capital. However, upon the best consideration we can give to the subject, we think the principle of the case *Ex parte Enderbey* may and ought to be extended to a case circumstanced like the present.

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The question, then, arises, whether, if the old creditors are entitled to treat this as a case within the seventy-second section of 6 G. 4., they may not exclude all other persons, on the ground, that if the funds of *Whiteside* have, under the circumstances, been placed in the hands of the two *Starkies* contrary to the policy of the law, no persons but the old creditors can prove. But we think they are not to have that privilege. In fact, the new creditors have a better right, upon principle, than the old creditors; because the new creditors trusted the firm on the faith of their apparent funds, including *Whiteside's* capital; whereas the old creditors never did trust them upon the faith of these funds, but only forbore to sue them upon the faith of their apparent stability. And unless there be some principle which forbids different classes of creditors claiming upon the same funds, we think both sets of creditors ought to be permitted to prove; that is, the new creditors, on the ground of the funds belonging to persons whom they certainly trusted; and the old creditors, on the ground of the two *Starkies* being the apparent owners of the whole. Still further, if the creditors of the old firm claim to exclude the creditors of the new firm, another answer may be given, to which, indeed, we have already referred, viz. that as *Whiteside* was a secret partner, the creditors of the new firm might have brought actions, or sued out a commission of bankrupt against the two *Starkies*, (according to the cases of *De Mautort v. Saunders and Executors*, *Ex parte Hamper*, and *Ex parte*

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Norfolk, before referred to), and then, as *Whiteside* was a dormant partner, and the two *Starkies* were the apparent owners, the new creditors might have insisted upon *Whiteside's* share being distributable under such a commission, and, consequently, would have the same right to insist upon the apparent ownership as the old creditors have. We are therefore of opinion, upon the whole of this case, that both the creditors of the two *Starkies* by themselves, and also the creditors of the two *Starkies* and *Whiteside* jointly, should be admitted to prove *pari passu* upon the joint estate of the three. Then, supposing the old creditors are entitled to prove upon the joint estate, it is to be considered whether those who had notice of *Whiteside* becoming a partner, can be admitted to the benefit of the proof? And upon that point, inasmuch as the proof is upon the ground of apparent ownership in the two *Starkies*, we think it can make no legal difference whether the old creditors knew of the change or not, inasmuch as none of the old creditors trusted the firm while *Whiteside's* property was in it; and, therefore, the knowing or not knowing of the change seems to us to make no difference. We see, therefore, no objection to those particular creditors being allowed to prove, as well as the rest.

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IN THE HOUSE OF LORDS.

DOE dem. F. HEARLE and A. M. HEARLE, his May 25.
 Wife, v. HICKS.

BY a special verdict in this case, it was found that *J. H.* devised his copyhold premises called *P., &c.* to the use of trustees, in trust for his wife, during her life or widowhood, or so long as she should reside upon the premises; remainder to the uses declared of his residue: he devised to the same trustees a freehold estate, charged with an annuity, in trust for his daughter for life, remainder to the use of her children in tail, and in default of issue, upon the trusts declared as to his residue; he further devised to the same trustees certain freehold premises, and all the residue of his real estates, in trust for his son *H.* for life, charged with an annuity to testator's wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to testator's wife, to the use of his grandson *G.* for life, remainder to the sons of his grandson in tail male; and on failure of such issue, to the use of the sons of his daughter in tail male, remainder to his own right heirs. He bequeathed all his ready money to his wife absolutely; the dividends of all his money in the funds to his wife for life; and all the personal property in and upon the copyhold premises, in trust for his wife, during such time as she should be entitled to the copyhold premises, and on the determination of her estate therein, for his son, the devisee of the residuary real estate. The testator, by his first codicil, referring to his will, and reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary estate with a further annuity to his wife, over and above those already limited thereout for her benefit; bequeathed two further annuities to his daughter and to her husband, and revoked the bequest of his personal property in and about his copyhold premises, giving the same and the residue of his personal property absolutely to his wife, and in the event of her death before him, to his nephew. By a second codicil the testator appointed his wife sole executrix and residuary legatee of his personal property; and by a third codicil directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease by his heir in possession. By a fourth codicil, revoking and making void several of the dispositions theretofore made by his will and codicils, of all his freehold, copyhold, and personal estate and effects of every kind and description, instead and in place of such devise, disposition, and bequest thereof, gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects

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of every kind and description whatsoever and wheresoever situated, to his daughter for life, remainder to his grandson and his heirs in strict entail, the rents to accumulate for his benefit till he was twenty-one; and on failure of issue, as by his will directed: he ratified, and confirmed the several annuities and donations by his will and former codicils bequeathed; and gave and bequeathed to his wife a further annuity, with the like restrictions as the former were payable; in all other respects confirming his will and codicils.

Held, that the devise to testator's wife of the copyhold premises called *P.* was not revoked by the fourth codicil.

To revoke a clear devise, the intention to revoke must be as clear as the devise.

powers

trustees, in trust for his wife during her life, or widowhood, or until she should cease to reside, &c.; remainder to the uses declared of his residue: his freehold estates, called *Treravel*, to trustees and their heirs, in trust to raise an annuity of 20*l.* per annum, and to pay the same to the separate use of his niece *Frances Mountstevens*; in trust to dispose of the residue of the rents to the separate use of his daughter *Anne Maria Hearle* for life: and in case his niece should die in the lifetime of his daughter, then in trust to pay the whole to his said daughter: after the decease of his said daughter, but subject to the said annuity of 20*l.* to his niece, to the children of his daughter as tenants in common in tail; but in default of issue, then upon the trusts declared as to his residue; and all the residue to trustees and their heirs, to the use, intent, and purpose that his wife might take thereout one clear yearly rent charge of 300*l.* per annum, with power of distress, &c.; and subject to the rent charge, to the use of his son *William* for life; remainder to trustees, to support contingent remainders; remainder to the first and other sons of the said son in tail male; on failure of issue, to the intent that his wife might take a further annuity of 100*l.* during her life or widowhood; with a term for ninety-nine years in two of the trustees, to raise an annuity for his daughter, *Anne Maria Hearle*, for her separate use; remainder to the use of testator's grandson, *John Graves*, for life; remainder in strict settlement to his first and other sons, &c.; remainder to the first and other sons of his daughter, *Anne Maria Hearle*; with a proviso, that if any son of his daughter should be born in the lifetime of testator, he should take a life estate only with remainder to his first and other sons in tail male;

powers of charging and leasing, except the *Plomer Hill House*, &c. remainder to testator's own right heirs: all money in the funds, &c. to his trustees, to pay the interest and dividends to his wife during her life or widowhood, with power to her to appoint 500*l.* for the benefit of his said son and daughter: all his ready money, &c. which might happen to be in his mansion called *Plomer Hill House*, and the wines and stock, &c. on his said copyhold premises, to his wife for her own absolute use and benefit: all the furniture, &c. to his wife during such time as she should be entitled to his copyhold mansion: remainder, &c., as to all the rest and residue of his personal estate, to his said son for his own absolute use and benefit; with a charge upon his funded property, and if insufficient, upon his residue for payment of debts. The testator declared that the annuities to his wife were to be in addition to those settled on her at her marriage. He then appointed the trustees his executors. By a codicil, dated the 10th of *May* 1822, the testator, referring to his will, and reciting the death of his son *Horatio*, devised *Treravel*, after the death of his daughter, to her husband, *Francis Hearle*, for life; with remainder to the same uses as in the will; charged all his residuary real estate with a further annuity of 100*l.* to his, testator's, wife during her life or widowhood, over and above, and in addition to, the several annuities or yearly rent charges of 300*l.* and 100*l.* by his will charged thereon, or limited thereout to or in favour of his wife, as therein mentioned, and which he did thereby ratify and confirm, and all other provisions made for her by his will and codicil; he also charged the residuary estate with a further annuity of 200*l.* to his daughter, and of 100*l.* to her husband; he likewise, after reciting the bequest of his personal property at *Plomer's Hill* to his wife for life, revoked that bequest, giving the same to his wife absolutely; and gave the residue of his personal property, bequeathed

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queathed by his will to his son, to his wife absolutely; he also made a provision for his great nephew *William Mountstevens*, and ratified his will in all respects, save and except as altered by that codicil. On the 15th of *July* 1822, by another codicil, he appointed his wife sole executrix and residuary legatee of his personal estate; and on the 18th of *July* 1822, by a further codicil, directed that the proceeds of five shares, which he held in the County Fire Office, should be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and after their decease, by his heir in possession. By his fourth codicil, of 14th *September* 1822, "revoking and making void several of the dispositions theretofore made by him in his will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description, instead and in the place of such devise, disposition, and bequest thereof, he gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter for life; remainder to his grandson, *John Graves*, and his heirs, in strict entail, the rents to accumulate for the benefit of *J. G.* in case he should not be twenty-one on the death of testator's daughter, and on failure of issue, that his estate should go and descend as by his will he had directed; he thereby ratified and confirmed the several annuities and donations by him in his will and former codicils bequeathed; and gave and bequeathed to his dear wife a further annuity of 100*l.*, to be paid with the like restrictions as the former ones given her by his will and codicils; thereby in all other respects, but what were above mentioned, confirming his will and codicils." And by a fifth codicil, dated 13th of *July* 1823, he declared the property bequeathed to his daughter to be to her separate use; granted an annuity to her husband; gave and confirmed to his dear wife,

wife, and at her disposal, any sum of money she might be entitled to from the effects of her late father, or any other friend should leave her; and ordered his executors, in case she should die before him, to fulfil her will and disposal thereof.

The will and codicils were duly executed to pass real estates; and the testator died in *June* 1825, seised of the estates therein mentioned, leaving his wife, the defendant, and *A. M. Hearle*, him surviving.

Judgment was given for the Plaintiff in the Court of Exchequer, by *Alexander C. B.*, in *Hilary* term, 1827, which was reversed on error, in the Court of Exchequer Chamber, in *Trinity* term, 1827. (a) And upon error to the House of Lords, *Tindal C. J.* now delivered the opinion of the Judges as follows: —

TINDAL C. J. My Lords, the question which your Lordships have been pleased to propose to his Majesty's Judges is this; whether, according to the true construction of the will and codicils which have been stated upon this appeal, the devise in the will of the testator's copyhold messuage or mansion-house, barns, stables, buildings, and pleasure-grounds, lands and hereditaments, called the *Plomer Hill* estate, was revoked by the fourth codicil. And upon this question, though it must be admitted to be difficult to draw any very certain conclusion as to the intention of the testator, the opinion which we have formed, upon the best consideration of these instruments is, that the devise in the will above specified, was not revoked by the fourth codicil.

The general principle upon which this opinion proceeds may be stated thus: The testator does by his will shew a clear and manifest intention to devise the *Plomer Hill* estate to his wife for life, or during her widowhood.

(a) For the argument see *1 Young & Jer.* 472.

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If such devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil, to shew that the intention to revoke is equally clear and free from doubt, as the original intention to devise. For if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.

My Lords, it is the opinion of my learned Brothers and myself, that the clause of revocation contained in the fourth codicil, does not apply to the devise in question with such clearness and certainty as to operate as a revocation of that plain and explicit devise contained in the will.

In this general conclusion we all agree; but it is scarcely to be expected, that in the discussion of a question of this nature, we should all arrive at the same conclusion upon grounds precisely the same. In stating, therefore, to your Lordships those grounds upon which I have formed the opinion, not simply that there is no clear intention to revoke the devise, but that, upon the clear construction of the codicil, the clause of revocation does not apply to this particular devise, I cannot undertake to say I am expressing the opinion of all my learned Brothers in each particular reason which I may advance, although in most of those reasons all concur, and I am not aware that there is any material dissent or diversity of opinion in respect to any.

That the testator not only intended to devise to his wife the enjoyment of the house and premises in which he lived during her life or widowhood, but that it was a paramount object with him, appears abundantly by the first will and codicil. It forms the first subject of devise in his will. "In the first place, I give and devise all that my copyhold messuage or mansion-house, barns, stables,

stables, and buildings, pleasure-grounds, lands, and hereditaments, called *Plomer Hill House*, in the parish of *West Wycombe*, and now in my own occupation, together with the cottages or tenements or premises thereto belonging, to trustees (therein named,) and their heirs, upon trust for my present dear wife *Susanna Jemima Hicks* during her life or widowhood, or until she shall cease to reside at the same premises, or let the same, or permit the same to be occupied by any other person than herself, she paying all taxes and outgoings in respect thereof, and keeping the same in good and tenantable repair;" and then, in the event of her death, second marriage, ceasing to reside, or letting the premises, or permitting any other person than herself to reside therein, he directs the trustees to be seised and possessed of these copyhold premises upon the same trusts as (regard being had to the nature and quality of the tenure of the said copyhold premises) will best correspond with the uses declared concerning the residue of his real estate.

He afterwards devises to his wife all his money in the funds during her life or widowhood; and after her death or marriage, to such person as should be either tenant for life or in tail of his residuary estate, with a power to her to appoint 500*l.* as therein mentioned; and then gives to her absolutely, all the ready money which shall happen to be in his mansion called *Plomer Hill House*, at the time of his decease, all the articles of plate brought by her on her marriage, his family carriage, and the wines, provisions, and provender, live and dead stock, which at the time of his decease shall be on his copyhold "premises;" and then devises "all his household goods, furniture, books, prints, pictures, china, glass, and plate not thereinbefore bequeathed, unto the trustees in trust for his said wife during such time as by virtue of his will she shall be entitled to his copyhold mansion

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mansion and premises; and after the determination of her estate in the same, in trust absolutely for the person who then, either as tenant for life or in tail male, shall be in the actual possession of his residuary real estates."


The testator, therefore, by his will has not only devised the mansion to his wife, but has shewn a clear and anxious desire that his wife should continue to reside in the mansion which he then occupied, and that it should not be in any manner dismantled or unfurnished, but should be enjoyed by her in exactly the same state as that in which it was left at the time of his death.

In his first codicil, made after the interval of a year, it is evident that the same intention that his wife should reside in the mansion house, in the same state as left at the time of his death, continued to be predominant in the testator's mind; for after reciting the bequest in the will to his wife of the plate, furniture, and other articles before adverted to, he proceeds to revoke such bequest in plain and direct terms, and in lieu thereof bequeaths all his farming stock, household goods, &c., "and all other his effects which should be in or about his residence at *Plomer Hill* aforesaid, and usually considered as comprised in and constituting his establishment there," unto his wife, for her own use and benefit absolutely.

It is further to be observed, that the testator's wife appears to have been from the time of the making of the will down to the time of making the fifth and last codicil, the object of his peculiar bounty and regard; there being no codicil, with the exception perhaps of the third, which does not materially add to the provision already made for her by his previous dispositions in her favour.

The will gives his wife a rent-charge of 300*l.* a year for life charged upon the residue, with a contingent increase of 100*l.* per annum, in case of the failure of
issue

issue of his son. By the first codicil, made after the death of his son without issue, he gives his wife absolutely the additional annuity of 100*l.* per annum, and bequeaths to her the residue of his personal estate absolutely to her own use. By his second codicil he constitutes her sole executrix and residuary legatee. By the third codicil he gives her the proceeds and profits of the five shares which he held in the County Fire Office, for her life. By the fourth, the codicil in question, he gives to his wife a further annuity of 100*l.* per annum for life. And by the fifth he gives to her, and at her disposal, all sums of money which she or the testator might be entitled unto, out of the effects of her late father, or that any other friend might leave her; and he orders his executors, "in case she shall die before him, to fulfil her will and disposal thereof." This codicil was executed about nine months subsequently to that upon which the question arises.

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The will thus containing such a clear devise to the wife, with such a manifest indication of intention that she should reside in the mansion house called *Plomer's Hill*, and each codicil containing proof that the regard of the testator for his wife continued unabated and unimpaired until long after the execution of the fourth codicil, the first observation that arises is, that it is extremely improbable in itself that the testator should by general words, without making any reference to his wife, or any disposition in lieu thereof in her favour, revoke the only devise of land which he had made to her, which forms the first subject of his will, to which repeated allusions are made in the will itself, and first codicil, and her residence in which during her widowhood appears to have been the favourite object of his mind.

Still, however, the question arises whether he has by the fourth codicil revoked this devise or not?

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That the words used in the codicil do not necessarily revoke the devise, is sufficiently manifest by referring to them. The testator begins by saying, "I do make and add this further codicil to my will, hereby revoking and making null and void *several* of the dispositions heretofore made by me in my said will and codicil of *all* my freehold, copyhold, and personal estate and effects of all and every kind and description," and concludes it by saying, "hereby in all other respects but what is above mentioned confirming my said will and codicils."

There are no words, therefore, expressly revoking this devise; on the contrary, if we hold *all* the dispositions of his real estate to be revoked, we construe the codicil directly against the testator's declared intention. It is as much open to argument that the devise to the wife may be one of these, or the very one which the testator intended to confirm, as that it was one of the *several* which he intended to revoke. Whether, therefore, this devise was revoked must be determined, not by any express words to that effect, but by the consideration whether, upon the construction of the codicil, the devise and disposition therein contained must of necessity be held inconsistent with the devise to the wife; or whether such a construction may be put upon the devise in the codicil, that both the will and the codicil may stand together.

To consider this question, it is necessary in the first place to observe how the disposition of the testator's property stood under the will and the first codicil at the time when the fourth codicil was made. And upon a careful inspection of the will and first codicil it will be found, that at the time of executing the fourth codicil, the testator's real property stood thus disposed of; viz. the copyhold estate (the *Plomer Hill* house) was devised to the wife for life, the remainder forming part of the residue.

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The *Treravel* estate stood thus: an equitable estate to his daughter, *Anna Maria Hearle*, for life, for her separate use; remainder to her husband for life; remainder to her children in tail as tenants in common; the remainder forming part of the residue.

The residue of his property, consisting of the manor and advowson of *Bradenham*, two freehold farms in the county of *Bucks*, and so much of the testator's estate in the *Plomer Hill House* and the *Treravel* property as were undisposed of, and also comprising all his personal property, except the partial interests given to the wife, which have been before enumerated, formed one mass; which, at the time of making the fourth codicil, in consequence of the death of his only son without issue, stood devised immediately to the testator's grandson, *John Graves*, for life; remainder to his first and other sons in tail male; remainder to the first and other sons of the testator's daughter, *Anna Maria Hearle*, in tail male; remainder to his own right heirs.

Whilst his property stood thus disposed of, the fourth codicil is made, in which, after declaring his intention to revoke several of the dispositions made by him in his said will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description, "instead of and in the place of such devise, disposition, and bequest thereof, he gives, devises, and bequeaths all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever, and wheresoever situated, unto his daughter, *Anna Maria Hearle*, and from and after the determination of that estate, unto his grandson, *John Graves*, and his heirs, in strict entail, as in the said will mentioned," with the additional clause in the codicil as to the time when *John Graves* shall take; "and in failure of such issue of the said *John Graves*, he orders that his said estates and effects shall go and descend, as is by his said

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will directed ;" and then ratifies and confirms the several annuities and donations by him in his said will and former codicils given and bequeathed, and gives a further annuity of 100*l.* to his wife under the same restrictions as the former.

Now, if this devise in the codicil can be construed to be confined to the property which formed the testator's residue only, then the devise in the will of the copyhold estate in question to the wife for her life, will remain unrevoked, and the object of the testator in his codicil may still be carried into effect.

And that such may be the construction, without violating the words of the codicil, appears to be by no means unreasonable. In the first place, the codicil professes to make void "*several* of the dispositions heretofore made by him in his will and codicils of all his freehold, copyhold, and personal estate and effects of *all* and every kind and description ;" now, the only disposition made of *all* his freehold, copyhold, and personal estate and effects, is that devise which relates to the residue, in which all his property, freehold, copyhold, and personal, is brought together in one mass, with the exception of that part of the personal estate which is given to the wife absolutely by the will, and which is expressly confirmed to the wife by the subsequent part of this very same codicil.

In the second place, the testator says, " instead of such devise, disposition, and bequest," using the singular number, which would, in strict grammatical construction, be applicable to the devise or disposition of the residue, but not to the various dispositions contained in the will.

In the third place, the death of his only surviving son, *William*, who was the first taker for life under the clause disposing of the residue, makes it not improbable that he should wish to substitute in the residuary clause his only

only surviving daughter, to take the same estate therein which was before given to the son.

In the fourth place, if the devise to the wife, of the copyhold estate, is to be held to be revoked, then, not *several* only of the dispositions of the real property contained in the will, but all such dispositions, are revoked or altered. For the wife's life estate in the *Plomer Hill* property is gone; the equitable estate for life given by the will to the daughter in the *Treravel* estate, for her separate use, is merged in a legal estate for life given to her generally; and the daughter has a life estate in the residue now for the first time interposed before that of *John Graves*. But to revoke *all* the dispositions of the realty in the will and codicil, is against the express directions of the testator.

Still further, if the devise of the *Plomer Hill* estate to the wife is revoked, inasmuch as the codicil confirms the donations made in the will and codicil, the wife would still be entitled absolutely to the furniture, and to every thing which constitutes the establishment of the house. So that the house, upon the death of the testator, would immediately go to the daughter, but stripped and dismantled of all its furniture and establishment, which the testator appeared anxiously to intend should be kept together. Again, the codicil gives an estate for life to *A. M. Hearle*, and from and after the determination of that estate, to his grandson *John Graves*, and his heirs in strict entail, "as in his said will directed." Now this express reference to the will draws the attention to that part of the will in which alone there is any mention of *John Graves*, that is, to the disposition of the residue. It seems, therefore, a very reasonable construction of the codicil, that as the ultimate remainder of the property intended to be thereby disposed of, is limited by express reference to the clause in the will which contains the devise to *John*

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IN THE HOUSE OF LORDS.

May 25. MIREHOUSE and Another, who have survived
 GEORGE, Bishop of LINCOLN, Plaintiffs in
 Error, v. RENNELL, W^o, Defendant in Error.

An advowson belongs to a prebendary in right of his prebend: the church becomes vacant, and prebendary dies without having presented: the presentation belongs to his personal representative, according to the opinion of six Judges out of eight, delivered in the House of Lords.

THE judgment of the Court of Common Pleas in this cause, delivered in *Michaelmas* term 1825 (*a*), having been reversed by the Court of King's Bench in *Trinity* term 1827 (*b*), (*Tenterden C.J. dissentiente*); upon error to the House of Lords, the question was,

An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented. Does the right of presentation belong to his personal representative?

Upon which, the following opinions were delivered by eight of the Judges, who have so reviewed the whole of the authorities cited, as to render any report of the argument superfluous.

BOSANQUET J. My Lords,—The question proposed by your Lordships to the Judges for their opinion is this: An advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, does the right of presentation belong to his personal representative? In offering my humble reasons to your Lordships for answering this question in the affirmative, I propose, with permission, to consider it, first, with reference to the right of presentation itself, to which the question relates; secondly, with reference to the person (a prebendary of

(*a*) 3 *Bingb.* 223.

(*b*) 7 *B. & C.* 113.

a cathedral church) to whom the right first accrued; thirdly, with reference to the deceased prebendary's personal representative, whose right is the immediate subject of the question. With respect to the first point, I take it to be clear, that the patron's right of presentation to an ecclesiastical benefice is a temporal right. It is expressly said by *St. Jerman*, in the 36 cap. of the *Doctor and Student*, that the right of presentation is a temporal thing, and a temporal inheritance. It was insisted, however, at your Lordships' bar, that the right of presenting is a personal spiritual trust; and the authority of Bishop *Gibson* was relied on in support of that position. Bishop *Gibson* (*Codex Tit.* 33. cap. 1.) does indeed question the propriety of calling it a temporal inheritance, or that it ought, legally speaking, to be considered otherwise than as a spiritual trust. But he refers to no authority in support of his view of the subject. And in the very same chapter in which he suggests this doubt, he says that the right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it was built; that the right of advowson, though appendant to a manor, castle, &c., may be severed from it; and that being severed, it becomes an advowson in gross. And he calls the right itself an incorporeal inheritance which may be granted by deed or will. The grounds upon which it has been considered that the advowson, or patron's right to present, is a temporal and not a spiritual inheritance, are well stated by *Godolphin*, (*Repertorium Canonicum*, p. 209.;) who was, as your Lordships know, an eminent civilian and king's advocate after the restoration of King *Charles II.* "It hath ever been held," he says, "that by the common law an advowson is a temporal inheritance: for which he gives the following reasons: that it lieth in tenure, and may be holden either of the king or of a

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common person; and hath been held of the king *in capite* or in knight's service; that a writ of right of advowson lieth for him who hath an estate in an advowson in fee-simple; that a præcipe *quod reddat* lieth for it; that a common recovery may be suffered of it; that an advowson, as other temporal inheritances, may be forfeited by attainder, or lost by usurpation, negligence, and other means there specified; that the wife shall be endowed thereof, and the husband be tenant by the curtesy; that it may be taken in coparcenary; that it may pass by way of exchange for other temporal inheritance; that by grant of all lands and tenements an advowson doth pass; and if not by livery, yet by deed, is transferable as other temporal inheritances, which pass with the manors whereunto they are appendant. It is said that the object of an advowson is of a spiritual nature, since it is to provide a spiritual person to serve the church; but the right to nominate such person is not the less a *temporal estate*." That right, according to *Fleming C. J. (Starkie and Pool's case, 1 Bulstrode, 21.)*, is an interest and not authority. The spiritual interests of the church are provided for by subjecting the fitness of the person nominated to the judgment of the bishop, but the exercise of the patron's *right of nomination* is not subject to the jurisdiction of any court but the king's temporal courts. On this point, *Godolphin* (p. 256.) says, "It is sufficient for the ordinary's discharge, if the presentee be able, by whomsøever he be presented; which authority is acknowledged on all sides to have ever been inherent in the ecclesiastical jurisdiction. But as to the right of presentation itself, to determine who ought to be presented, and who not, and at what time and when the church shall be judged to become void, and when not, all these appertain to the king's temporal laws."

It appears to me, therefore, my Lords, to be indisputable that a right of presentation is temporal property,
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the alienation of which must be governed by the rules and analogies of the common law; and that it is no more to be considered in contemplation of law as a trust, than all other temporal property for the proper use of which the owner is responsible *in foro conscientia*.

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An advowson, being an incorporeal hereditament, may be taken by descent, conveyance, or devise, like other temporal property of that class. It may be limited in fee or in tail for term of life or for years.

If the advowson be held in fee or in tail, it descends to the heir general or special. If for life, it passes to the remainder-man or reversioner; all these being freehold interests. A term of years or a single turn goes to the executor or administrator; such interests being less than freehold: and the whole estate, or a portion of it, or a single turn only, may be sold for a pecuniary consideration.

If, indeed, the church be vacant, the right of presentation for that turn cannot be granted by a subject either for value or gratuitously.

This restriction, however, is not peculiar to a right of presentation: it applies to annuity or rent actually due, which may be granted before the day of payment, but which cease to be alienable at law after they have accrued; yet the arrears in both cases are unquestionably temporal rights.

The nature of the difference which subsists between the right to present on the next turn which may accrue, and the right of presentation to a vacant turn, it is now material to consider. The right to present upon the next turn which shall accrue, is an interest carved out of the fee in the advowson, and if re-conveyed to the owner of the fee, will merge. But the right of presentation to a vacant benefice, though arising from the advowson, is no part of it.

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It has sometimes been called a chattel, sometimes a chose in action, sometimes a fruit fallen. It is called (in *Dyer*, 283.), a mere personal thing—a thing in right power and authority, a thing in action; and in effect, the fruit and execution of the advowson, and not the advowson. See *Co. Lit.* 120. a. It said to be not *merely* a chose in action; for it survives to the husband, which a bond does not. But, by whatever name it may be called, it is treated in law as a right of a distinct nature from the ownership of the advowson itself. In *Jenkins's Cent.* p. 236., it was held by all the Judges of *England*, that where the next presentation to a church *then void* had been granted, the grant, being made by a subject, was void. For the present avoidance (it is said) is a thing in action and privity, and vested in the *person* of the grantor (the patron), and is like a relief or arrear of rent, or an obligation or a debt; and it is added, if a grantee of an annuity in fee grants an annuity for lives or years, it is good; for this is an estate settled and of continuance; but a grant of the arrears of the annuity is void, *causâ quâ supra*: that is, because the subject of the grant is become a chose in action; and notwithstanding what is stated in the note to the *Bishop of Lincoln v. Wolforstan* (a) respecting the fictitious nature of this reason, it appears to me fully warranted both by analogy and authority in point. No instance can be shewn in our books in which a right of presentation to a vacant church has accompanied the ownership of an advowson in the hands of a subject, if the person, to whom the right of presenting accrued, has ceased either by death or otherwise to hold the advowson. If a right of presentation accrues to the owner in fee of the advowson, it does not pass to his heir. If the right accrues to a tenant in tail or tenant for life of the advowson, it does not pass to the issue in tail or the remainder-man. But in all these cases it goes to the

(a) 3 Burr. 1504.

executor, as the representative of the personal rights of the individual to whom it accrued. If the right accrues to a lessee for years of the advowson, and the term expire within six months afterwards, the lessee is entitled to present, notwithstanding the expiration of the term, in preference to the reversioner. Upon what principle can such a claim be sustained, but that of a personal right vested in the individual during the term, distinct from his interest in the advowson? If a *feme covert* be entitled to an advowson, and the church become void during the coverture, and the husband survive, he shall present; but if the avoidance happened before the coverture, he shall not present, such right being, as it is said, only a chattel real in action, not reduced into possession during the coverture. And if the avoidance happen during the coverture, the husband shall present, though he be not tenant by the curtesy, as in cases where the wife had but a life estate, or where there has been no issue of the marriage: and in such case, if the husband himself die before presentment, his executor shall present, and not the heir (*Watson's Clerg. Law*, cap. 9.). Can any reason be assigned for this, but that the right which had accrued during the coverture was distinct from the estate in the advowson?

The uniformity of the law in all these instances appears to me manifestly to shew the general rule to be, that the right to present to a vacant church vests in the individual to whom it accrues as a personal right, which, though accruing from the advowson, is no part of it, is not annexed to it, and does not follow it when it devolves upon any other person than the individual to whom the right of presentment first accrued. Two instances, indeed, may be mentioned, in which, though the right of presentation does not pass to the succeeding owner of the advowson, it does not pass to the personal representatives of the deceased individual to whom it first

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first accrued. These are the cases of a bishop and a tenant *in capite* of the crown, in both of which cases the right belongs to the king. This right of the king upon the death of a bishop is sometimes said to arise by reason of his title to the temporalities, and sometimes by reason of his prerogative. But it is equally consistent with either form of expression, to say that it arises by reason of the relation in which a bishop stands to the king.

The temporalities of a bishop, of which his advowsons form a part, are held of the king *per baroniam*.

The title of the king to seize the temporalities upon the bishop's decease, may reasonably be referred to the tenure by which they are held: and the further title to one of the fruits of these temporalities accrued during the life of the bishop, and vested in him as a chattel at his death, may, consistently with analogies of the law, be referred to the same source.

That the right in question is a condition of the bishop's tenure *per baroniam*, there is great reason to suppose, from the similarity of right which accrues to the king in the case of a tenant *in capite* by knights' service.

If tenant *in capite* be seized of a manor with an advowson appendant, and the church become void, and he die, his heir within age, the king shall not only have the wardship with the right of presenting to such livings as become void during the infancy of the heir, but to any right of presentation which accrued during the life of his tenant.

In this respect the case of tenant *in capite* is strictly analogous to that of a bishop. Yet, if the land be holden by knights' service of a common person, and not of the king, the executors of the deceased tenant shall present, and not the guardian. (*Co. Litt.* 90. a. 388. a.)

And if tenant in socage be seised of an advowson, and the church become void, and he die, his heir under
 age,

age, the guardian in socage shall not present, but the executor or administrator.

Sir *E. Coke*, in one place, gives as a reason why the king shall present in the case of a bishop, that the presentation is but a chose in action (90. *a.*); and in another, that nothing shall be taken for the presentation, and, therefore, it is no assets (388. *a.*) The circumstance of the presentation being a *chose in action* is a singular ground of objection to its going to the executor; and that of its not being assets would be equally applicable to the cases of a tenant who holds in socage, and to a tenant *par avail* who holds by knights' service; in both which cases the executor is entitled. How far, indeed, it is quite correct to say that a presentation is not assets, will be seen hereafter. If the right of the king to a presentation accrued before the bishop's death, be not a condition of tenure, it may possibly be derived from the same principle which entitled the king to other personal property of the bishop upon his death. It will be recollected that the king is entitled (according to Sir *E. Coke*, 2 *Inst.* 491.) to six things: — the bishop's best horse or palfrey, with his furniture; his cloak, or gown, and tip-pet; his cap and cover; his bason and ewer; his gold ring; and, lastly, his *mula canina*, his *mew* or *kennel* of hounds; which, says the record quoted by Sir *E. Coke*, *ad dominum regem ratione prerogativæ suæ spectant et pertinent*. The origin of the king's right to these chattels is not very clearly ascertained. *Coke* says, that it was not any mortuary; but was given to the king as a fine, that the bishops might have power to make wills, and grant probates and administrations. *Blackstone*, on the other hand (vol. ii. p. 245.), thinks that it was in the nature of a mortuary, which he calls a sort of ecclesiastical heriot, — a term which imports a duty due to a superior, either by service or custom. Whether it is to be

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be referred to the cause assigned by the one or the other of these learned persons, it is clear, that in cases to which the king's right did not extend, the chattels would pass to the executor. To shew that the right of presentation is not distinct from the advowson, the following case is relied on in *Fitz. N. B.* 39. : — “ If the king have an advowson in fee which voids, and during the voidance the king granteth the advowson in fee, the king shall not present to this avoidance.” Now, it will be observed, that this proposition turns altogether upon the effect of the king's *grant* ; and that a chose in action is grantable by the king, which it is not by a subject. That the proposition is founded on the operation of the king's grant, may in some degree be inferred from what follows, viz. “ But if the king have advowson by reason of the temporalities of a bishop, and during the avoidance the king restore the bishop the temporalities, yet he (the king) shall present to the advowson, and not the bishop for this avoidance.” In this case the *restoration* of the temporalities, of which the advowson is part, does not carry with it the presentation which has fallen while the temporalities were in the king's hand ; though it is said, in the former part of the passage, that a *grant* of the advowson would have that effect. A difference, therefore, is taken between a grant of an advowson by the king, and a restoration of the temporalities, including the advowson. Moreover, it must be observed that Sir *Matthew Hale*, in his notes on *Fitz. N. B.* does not implicitly adopt the position in the text, but cites some authorities to shew that even the *grant* of an advowson will not carry the presentation, unless there are special words of the avoidance in the grant. His note is as follows : — “ *Vide contra*, except there are special words of the avoidance. 16 *H.* 7. 8.; *Dyer*, 282. 302. *a.* 458. *a.* And see *Accordant*, 18 *Ed.* 3. 58. *a.*, but contrary in the case

case of a common person, 11 H. 4. 54. B. And an avoidance fallen is not *grantable* by a *common* person. *Dyer*, 283. 348.; *Staund. Prerogative*, 44.: 46 Ed. 3. *Grants*, 59.; 18 Ed. 3. 22., and in margin:” and *Watson* agrees with the suggestion of *Hale*; for he says, “If, when a church is void, the king *grants* a manor, with all advowsons appendant, the void turn does not pass thereby, unless he also mention it in his grant” (ch. 10.); and another case, arising upon a grant of the king, is stated in 2 *Roll. Abr.* 345., from which the distinct nature of the presentation strongly appears. “If the king has an advowson by reason of a wardship, and he grants to another during the minority of the ward, and after the church becomes void, and continues so until the ward attain his full age, whereby the interest of the grantee determines, yet the grantee shall have the presentation, and not the king.” This case is analogous to that of the lessee of an advowson, whose interest having expired, he is entitled to present to a church which had become void during the term. But for the grant, the king would be entitled in preference to the heir; and by virtue of the grant, the grantee is entitled in preference both to the king and the heir.

I will trouble your Lordships with only one more instance, which occurred in the reign of Queen *Elizabeth*, to shew how clearly the right of presenting to a void church was considered as distinct from the advowson itself.

If an advowson comes to the queen for forfeiture by outlawry, and then the church becomes void, and the queen presents, and then the outlawry is reversed for error, yet the queen shall enjoy the presentment, because it came to the queen as a profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the party

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party have restitution of the presentment. *Beverleigh and Cornwall's case. (a)*

Here the queen's right to the presentment, as a profit of the advowson while in her hands, is asserted in the first part of the case: and the subject's right to restitution of the presentment upon an avoidance before the outlawry, is acknowledged in the latter part, because such right of presentment became a distinct chattel before the outlawry.

Secondly. I am next to consider the question with reference to the person (a prebendary of a cathedral church) to whom the right of presentation accrued. A prebendary is a sole corporation existing by charter of foundation; or by prescription, which presumes a charter; and all the possessions of the prebend are derived either from the endowment of the founder, or of subsequent benefactors.

The right of presentation to a parish church must, therefore, have been derived mediately or immediately from the original patron of the *living*, who, as such, was seised of a temporal estate in the advowson.

The nature and incidents of that estate could not be changed by its transfer to any particular person or body politic. What the heir of a natural person cannot take, will not go to the successor of a sole corporation. For (as it is said in 4 *Rep.* 65. *Fulwood's case*) succession in a body politic is inheritance in the case of a body private. And, therefore, in case of a sole corporation or body politic, be it created by charter or prescription, as bishop, parson, vicar, master of an hospital, &c., no chattel either in action or possession shall go in succession, no more than the heir of a private man can have them; but the executors or administrators of the bishop, parson, &c. shall have them.

(a) *Moore*, 269.

On this ground it is that a bishop, parson, &c. or any sole corporation which are bodies politic by prescription, can take a recognizance or obligation only in their private and not in their public capacity.

If, indeed, there be a custom that the successor of any particular corporation sole, as the chamberlain of *London*, shall have a recognizance acknowledged to his predecessor, he shall take it, because the same custom which made him a corporation in succession for the particular purpose, has enabled his successor to take recognizances, obligations, &c. made to his predecessor, in the absence of which he would not be entitled to do so. The exception founded on custom in the chamberlain of *London's* case, establishes the general rule in those cases in which custom cannot be relied on. And, according to Sir *E. Coke*, in the case of bodies politic by prescription, such as bishops, parsons, &c. (in which, &c. is manifestly included prebendaries) there wants such custom to take a chattel (or, as I apprehend, any interest distinct from the inheritance), in their politic or corporate capacity. Independently, however, of this negative argument arising from the incapacity of the successor, I am led to infer from analogy, that the personal right of the prebendary, existing at the time when the church becomes void is to be preferred to that of his successor.

The appendancy of an advowson to a manor is analogous to its union with a prebend. Yet if the church is void, and the lord of the manor die leaving the church vacant, his executor, and not his heir, shall present. The title of a husband in right of his wife endowed of an advowson by a former husband, is not unlike the seisin of a prebendary in right of his prebend: yet if the church become void during the coverture, and the second husband survive, he, and not

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the heir of the first husband, shall present; and if the second husband die before exercising his right, his executor would be entitled to stand in his place. The ecclesiastical character of the prebendary does not appear to me to make any material difference between this case and that of any other corporation sole. A prebendary before the statute 13 & 14 *Car. 2. c. 4.* might have been a layman; a prebendary, as such, has no cure of souls; and was not obliged by the 13 *Eliz. c. 12.* to subscribe or read the thirty-nine articles. (*Burn's Ecclesiastical Law*, vol. ii. p. 79.)

Nor would the ecclesiastical character, supposing the prebendary always to have been a priest in holy orders, necessarily entitle his successor to a right of nomination or presenting to a benefice accrued to him in right of his prebend. The transmission of an archbishop's option to his personal representatives, and the right to dispose of them by will, is a strong instance to shew that a personal right, though arising from the ecclesiastical character, does not pass to the successor. Another, and strong instance, is that mentioned by *Fitzherbert* in his *Natura Brevium*, 34 N., "If a vicarage happens void, and before the parson presents, he is made a bishop, &c. yet he shall present unto this vicarage, because it was a chattel vested in him." Whether the case here put was founded upon any actual decision or only upon *Fitzherbert's* own understanding of the law prevailing in his own time, it has the sanction of his great name, and must be deemed of high authority. One distinction, indeed, is recognized between lay and ecclesiastical patrons in respect to the right to vary a clerk presented. If an ecclesiastical patron once present a clerk, and then vary his presentation by presenting another, the bishop is not bound to receive either. Whereas, if a lay patron having presented one clerk, afterwards present

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sent another, the bishop cannot absolutely refuse to institute, but may make his choice. The ground of which distinction is, that the ecclesiastical patron has not the same excuse as the lay patron for omitting to ascertain the sufficiency of the clerk first presented. *Keilway*, 154. But this distinction has no bearing on the question of succession to the right of presentation.

It has been urged at your Lordships' bar that where a judicial officer, entitled to appoint to some office, dies without having made an appointment, the successor in the office shall appoint.

The first answer to this case is, that such right of appointment is not property of any kind; and the next, that the same law, whether old or new, which has established the superior office, has regulated the right of appointment; in which respect the case resembles that of the chamberlain of *London*, the principle of which is, that the law which regulates the right of succession is coeval with the establishment of the office.

It now only remains for me, in the third place, to consider your Lordship's question with reference to the personal representatives of the deceased prebendary.

The right of the personal representatives of a natural person, where a right of presenting has accrued, was not disputed in argument.

It was admitted to be too firmly established upon authority to be now called in question; but it was contended to be an exception from the general rule of law, which ought not to be extended to a new case, the exception itself, though established, being, as it was said, inconvenient, and founded on a vicious principle.

I do not propose to offer to your Lordships any observation upon the convenience or inconvenience of the existing law, by which the personal representative in ordinary cases is preferred to the owner of the ad-

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vowson; but if the view which I have taken of the right be at all correct, the law which prefers the personal representative is the general rule, and it lies on those who deny its application to an administrator of a prebendary to establish a ground of exception.

It may be admitted that the right of such administrators has never been the precise subject of any judicial decision: but little is to be inferred from that circumstance either on one side or the other. If any argument is to be built upon the absence of litigation upon the subject, I should rather conclude that the general rule has prevailed, than that an exception to it had been admitted without dispute.

There can be no doubt that (generally speaking) the executor of a prebendary as well as every other ecclesiastical corporation sole, takes the personal right of his testator, whether in possession or in action, which accrued to the deceased in right of his prebend; such as the produce of the prebendal lands actually severed, or rent become due before the death of the prebendary. So a ward, relief, heriot, &c. accruing from the prebendal lands would pass as chattels to the executor; and on the other hand, the successor does not take any such rights or interests as are less than freehold. Even if a bond be expressly given to a corporation sole, (as the dean of *St. Paul's*), and to his successors, the successor shall not sue upon it but the executor. 20 *Ed. 4. 2 Bro. Corporation*, 60. It is urged, however, that the right of presentation to a vacant church is not a matter of profit, and that the personal representative of the deceased prebendary ought not to take it, because it would not be assets.

But the same argument applies to the personal representatives of a natural person, in which case their title is admitted to be unimpeachable. If the right of presentation

ation be not part of the freehold, it cannot be exercised by the successor; by whom, then, should it be exercised, but by the person who represents the personal interests of the deceased?

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The title of a personal representative is not confined to those things which become assets in his hands. All the personal estate of the deceased, whether held for his own benefit or for that of others, passes to his executor or administrator. Terms of years producing no benefit, covenants and obligations for the benefit of strangers, vest in the personal representative. If the patron be disturbed in presenting to a vacant church and die, his executor and not his heir must bring the writ of *quare impedit*.

It can scarcely be argued that the successor of a deceased prebendary, who was disturbed in his lifetime, could maintain such a writ; and if not, who but the executor could maintain it? And who is to have the writ to the bishop? Moreover, it is to be recollected, that in such an action damages are recoverable, and that damages would be assets.

In *Smallwood v. The Bishop of Coventry* (a) it was expressly held by the Justices that this action was within the equity of the statute of the 4 *Edw. 3.*, for the presentment is a chattel that should go to the executors, if the disturbance had not been; and for a disturbance in their own time they shall recover damages to the use of the testator; by the same reason for a disturbance in the time of the testator, they shall recover damages by the equity of the statute 4 *Edw. 3.*; and according to the report of the same case in *Saville*, 118., it was held, with reference to the objection that the presentment could not be assets, that every thing which the law gives by

(a) *Cro. Eliz.* 207.

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execution should be said to be valuable, and, consequently, assets; that by recovery in *quare impedit*, the damages would be assets; and so, as the advowson is assets in the heir, the presentment shall be in the executor.

Will it be said that such assets belong to the successor of a prebendary, or that he, rather than the executor, is to sue for them for the benefit of the deceased's personal estate? It has been objected in argument against the right of the personal representative, that he cannot present in right of the prebend; yet that he ought to present in that right in which the deceased prebendary must have presented. But the same difficulty, if it be one, would apply to the case of a husband, who, though not tenant by the courtesy, presents, after his wife's death, in respect of an advowson vested in the wife, to a living becoming vacant during the coverture; and also to the case mentioned by *Fitzherbert*, of a parson to whom a right of presenting to a vicarage has accrued in right of his church, and who presents a vicar after having vacated his rectory by promotion.

In both these cases, the title which accrued *alieno jure*, is asserted by the presenter as a personal right vested in the individual to whom it accrued.

My Lords, the observations which I have humbly submitted to your Lordships, have been confined to the case of a presentative advowson, the object of your Lordships' question being in terms a right of presentation.

The case of a donative advowson, in which there is no presentation to the bishop, stands altogether upon a different ground; not forming, as I conceive, any exception to the general rule which has been mentioned, but being of a nature to which the rule is inapplicable.

The principle of the rule which carries the right of presenting

presenting to the executor is, that the right which accrued to the testator, as patron, is become distinct from the advowson.

It belongs to the patron for a limited time only; which time is independent of his interest in the advowson. If not exercised within six months, it passes as a separate and distinct interest to the bishop; and if not exercised by the bishop within six months more, it passes in like manner to the king, neither the bishop nor the king having any interest in the advowson.

In the case of a donative, the right of presenting is subject to no limitation. Though the patron forbear to fill the church for any length of time, his right is not lost; it does not pass from him to the bishop, or to the king, or to any other person; and if he never fill the church at all, the common law has made no regular provision for compelling him to do so.

So different is the right of the patron of a donative from that of a presentative advowson, that, even during the incumbency, the sole right of visitation and connection continues in the patron, independent of the jurisdiction of the ordinary.

The patron alone can deprive the incumbent; and it is to him that resignation must be made.

It is unnecessary here to consider whether by the spiritual court or by any other means, the owner of a donative might be obliged to supply a minister for the service of the church, upon the ground of his having dedicated the church to the public for spiritual purposes; for, admitting such obligation to lie upon the patron, yet, during the vacancy of a donative, either by death, resignation, or otherwise, the freehold of the church, of the glebe, and of the tithes, reverts to the patron, and remains in him, till by a new gift he confers it on a new incumbent; and it would therefore be inconsistent with

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the title of the patron, that any other person should have a right to divest his freehold by collation.

For these reasons, my Lords, I am humbly of opinion, that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

BOLLAND B. Your Lordships have proposed, as a question for the opinion of the Judges, Whether, if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative.

It is highly probable that the state of facts, out of which this question arises, has in very many instances existed, and it is remarkable that no light is thrown upon the subject by any decision at law, nor by any practice of the church upon a presentation to a benefice under circumstances precisely similar to the present. If any such decision exist, it has escaped the industry of the experienced counsel, who argued this case in the Court below, and at the bar of this House, and the researches of the learned Judges of those Courts, whose enquiries were so sedulously directed to the discovery of some authority, upon which their judgment might be founded. It is to principle, therefore, and to cases analogous to the present, if any can be found, that the attention is to be turned, in order to arrive at a satisfactory conclusion.

In pursuing this enquiry, I do not mean to dispute that by the law, as it stands, if a presentative church, the advowson of which belongs to a layman, become vacant, and the *lay* patron die without presenting, his executor shall present, and not his heir or devisee, or
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the next owner of the advowson, it being considered that the next turn is a chattel; though this seems to have been doubted in the case of *The Queen v. The Archbishop of Canterbury, Fane, and Hudson*, and the Court left it undecided. The report is to be found in 4 *Leon.* 109. The distinction which I shall endeavour to make, will be, that the right of the owner of an advowson *does* depend, though the contrary is contended for on the part of the Defendant in error, upon the character, in which he holds, and that as the deceased was seised of, and in the prebend of *South Grantham*, with its appurtenances, to which prebend the advowson of the rectory of the parish church of *Welby*, with its appurtenances, belonged, in his demesne, as of fee, in right of the said prebend, the right of presentation to the church, when it should become vacant, arose out of his office of prebendary, was a spiritual trust to be executed for the support of and for the promotion of the welfare of the established religion, and that to him, and to him alone was confided the choice and appointment of an incumbent.

It appears from history, that for six or seven centuries the *parochia* was the diocese, or episcopal district; there was the residence of the bishop and his clergy at the cathedral church; all tithes, offerings, and ecclesiastical profits belonged to the bishop, and his clergy for their support, for the repairs and ornaments of the church, and for other works of piety and charity. Such community, and collegiate life of the bishop and his clergy was the practice of the *British*, and was afterwards adopted by the *Saxon* church.

Many causes contributed to the existence of parochial churches. In some places the liberality of the inhabitants raised them, and by supplying preachers with houses, induced them to settle and become the pastors; kings founded free chapels for the purposes of worship
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for their court and retinue. The bishops, too, to plant and encourage Christianity amongst the people, built churches; but the great source from whence the increase of the number of buildings for divine worship arose was the piety of the great lords, who, having large possessions and territories, founded churches for the use of their families and tenants within their respective domains; and hence it seems a title to patronage in laymen first sprung; hence the boundaries of parishes became commensurate with the extent of manors; hence the several portions of the same church were divided according to the separate interests of the several lords.

But, although for the purpose, and in the hope of more firmly establishing religion, and more widely extending its divine influence, these changes in the constitution and management of the church were permitted, the right of the bishop, either in respect of spirituals or temporals, was not invaded. He still had the cure of souls, and a title to all the ecclesiastical revenues within his whole diocese; by his authority and consent priests were ordained, as assistants given to him; no church could be used for public worship till consecrated by him; no priest could officiate there without his delegation.

From the causes, I have above stated the privilege of nominating fit persons to officiate in churches, which the piety and liberality of private persons had founded or endowed, was given; and the bishops were content, in such cases, to forego the privilege of appointing the ministers, who were to perform the duties in such churches; this power was conceded to the founders or benefactors *ratione fundationis*, where they were founders; *ratione donationis*, where they endowed the churches; and *ratione fundi* where they gave the soil upon which they were built; the bishops reserving only the power of deciding upon the fitness of the persons nominated, 1 Co. Litt. 119. b. In process of time this practice be-
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came the law of the church. The church having made these concessions, and having thus parted with the right of presenting, it became a matter of indifference to the bishops, whether, upon the death of the lay owner of an advowson, during the vacancy of the church, belonging to it, the right that the patron, had he lived, would have exercised, should go to his heir, or should belong to his executor; the church left that question to the courts of law to determine, and I am bound to admit, that in such cases, the claim of the executor is established: but I cannot apply that rule to the case in question, because the advowson, of which the late prebendary of *Grantham* was seised was given to him as a member of the church of *Salisbury*, was appendant to an ecclesiastical dignity, and is not to be governed by the same law as is applicable to advowsons in lay hands.

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If I am wrong in taking this view of the question, the error arises from my considering the right of the executor of a lay patron to be an exception from the rule which governed property of this description in the hands of the church, as there appears to be a manifest distinction between lay and spiritual property.

In the note upon the tenth section of *Littleton*, *Co. Lit.* 17. b. it is said, "Of an advowson wherein a man hath an absolute ownership and property, as he hath in lands and rents, yet he shall not plead that he is seised in *dominio suo ut de feodo*, because that inheritance savouring not *de domo*, cannot either serve for the sustentation of him and his household, nor can any thing be received for the same for defraying the charges, and, therefore, he cannot say that he is seised therein, in *dominio suo de feodo*." In the section of *Littleton*, upon which this is a commentary, the author is treating of an advowson in lay hands, and these authorities are adduced by *Gibson* in his *Codex*, p. 757., in speaking of spiritual property to illustrate the difference he points out.

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out. In the pleadings in the present case, the prebendary is alleged to be seised of the advowson in his demesne as of fee, and why is it so pleaded? The answer is, it is not a lay title; but that, to use the language of *Coke*, it savours *de domo*, may be made serviceable for the sustentation of him, as a spiritual person, and his household. The case of *London v. The Chapter of the Collegiate Church of Southwell* (a) is a further proof of the distinction I have taken between lay and spiritual property.

I shall next call the attention of your Lordships to the ecclesiastical character of the officer, in whom, till his death, it cannot be denied, the right of presentation was vested, to the object of the founder of the prebend, and to the nature of the property with which he endowed it.

A prebend, as defined by Dr. *Cowell*, is the portion which every member or canon of a cathedral church receiveth in the right of his place for his maintenance. So *canonica portio* is property used for that share which every canon or prebendary receiveth out of the common stock of the church; and *prebenda* is a several benefice rising from some temporal land or church appropriated towards the maintenance of a clerk or member of a collegiate church, and is commonly named of the place where the profit groweth. And these prebends be either simple or with dignity. Simple prebends be those which have no more than the revenue towards their maintenance. Prebends with dignity are such as have jurisdiction annexed to them, according to the divers orders in every church. Of the object of the founders of prebends there cannot be a doubt; it was to provide for the maintenance and support of the prebendaries; and it cannot be supposed that it was the intention of any

(a) *Hob.* 303.

founder that the instalments of the prebend should be appropriated beyond the life of the party in possession. I shall not stop to enquire whether this charitable intention of founders has not been in a great measure defeated; but I shall confine myself to the consideration of whether the particular right contended for by the executrix is founded upon any decision, or can be supported upon principle.

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It is admitted on all hands that no authority is to be found on the subject; let us then look to the character of the person under whom the right to present to the church of *Welby* is claimed by the Defendant in error. He was an ecclesiastic; as a layman he could not at this day have enjoyed the dignity; the office was conferred on him by the church; its emoluments and profits were intended by the founder for his support; to him was confided the sacred trust of providing a proper minister for the church appendant to his prebend. Looking back to the times when similar benefactions were bestowed upon the church, no one can hesitate to be convinced that the founder of the prebend of *South Grantham* intended the prebendary to become incumbent of the church, or, at least, that he should (unless provided for in such a manner as to render the living of *Welby* untenable) have the power of being so. The selection of the prebendary by the bishop was a voucher for his piety, and a sanction and authority to him that in presenting himself, or any other clerk, the true interests of religion would be promoted. Can it be contended that the trust can be carried further? To do so is to put into the hands of a stranger to the church a trust the execution of which was confided to a member of its own body; is to divert the course of the founder's bounty into a different channel from that in which he intended it should flow, and to establish a precedent by which

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which the best interests of the church (I admit the instances would probably be few) might be affected.

If I am correct in considering an advowson in the hands of a prebendary in right of his prebend, as a separate trust which is vested in him *jure ecclesiæ*, it should be enquired whether such a trust can be transferred to another, or whether it survives, and will go to the representative of the deceased person in whom it was placed. I find in *Colt and Another v. The Bishop of Litchfield and Coventry* (a), it is said, that "if a lapse incur, and then the ordinary die, the king shall present, and not the executors of the ordinary, for it is rather an administration than an interest." *Fitz. N. B.* 34. (G), 25 Ed. 3. 24. *Dyer*, 87. The case of *Chester College* is doubtful, whether to the king or to the metropolitan. So again, *Hob.* 154., "A lapse, as I have said, is an act and office of trust reposed by law in the ordinary, metropolitan, and, lastly, in the king; the end of which trust is to provide the church with a rector in default of a patron, and yet as for him and to his behoof; and, therefore, as he cannot transfer his trust to another, so cannot he divert the thing wherewith he is trusted to any other purpose." The reason given by the learned Judge why the presentation does not go to the executors of the ordinary, viz. that it is an administration rather than an interest, appears to me mainly to fortify the position for which I am contending.

I cannot fail also to pray in aid the weight that is to be derived from the further consideration of the legal character of a prebendary. He is an ecclesiastical sole corporation; and, as such, he can have no heir nor personal representative. To his natural heir his prebendal rights cannot pass, nor can they vest in his personal

(a) *Hob.* 154.

representative; but the right of presenting to the vacant church must remain unsevered and in abeyance till the appointment of a successor. In treating this matter, I have not commented upon, nor attempted to remove the effect of, those arguments that have been drawn from several of the authorities that have been relied upon in support of the claim of the Defendant in error; because, as they have proceeded upon lay patronage, they have, in the view I have taken of the subject, no bearing upon the question.

From what I have said, your Lordships will have collected, that the opinion to which I have come is, that if an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation does not belong to the personal representative of the deceased prebendary.

J. PARKE J. To the question which your Lordships have been pleased to refer to the Judges, I answer, that in my opinion the right of presentation belongs to the personal representative of the deceased prebendary.

The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any Court; nor is there to be found any opinion upon them, of any of our Judges, or of those ancient text writers to whom we look up as authorities.

The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents:
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and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which, they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

I propose, therefore, to enquire by reference to those sources from which we usually derive them, what the rules and maxims of the common law upon this subject are, and it will be found that there is little difficulty in the enquiry, and none as it seems to me in their application to the facts under consideration.

The decision of the present case, depends upon two propositions, both of which appear to me to be established by authority, and neither of which can be shewn to be unreasonable or inconvenient.

First, That in every *presentative* benefice, the void turn is a personal right or interest which is disannexed from the estate in the advowson, and vested in the person of the individual to whom the advowson then belongs.

Secondly, That whether valuable in a pecuniary point of view or not, all personal rights and interests of the nature of property, and which are not extinguished by death, (with some exceptions, which are easily explained, and which have no bearing upon the present case,) vest on the death of the owner, in his personal representatives.

The first of these two propositions, I say will be found to be supported by authority; for in every case
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which is reported, and in every book in which the subject has been treated of or mentioned, as far as I have been able to discover, the void turn or right of presenting to a vacant *presentative* benefice, is either expressly stated to be a personal right or interest under a considerable variety of description, or the cases mentioned are capable of a satisfactory explanation upon that supposition only.

It is true that the great majority of the authorities, to which I refer, relate to benefices in lay hands, but *all do not*; and there is no one case, text book, or dictum, of which I am aware, in which any intimation is conveyed that there *is any exception* to this general rule. Surely it is impossible to argue with such a constant, uniform, and unvarying course of precedent on one side in all cases in which the subject has been in question; and in the absence of all authority for such an anomaly on the other, that the case of an advowson in spiritual hands is an exception to the general rule; and if the absence of authority were not sufficient, it seems impossible to shew in what way the exception could have arisen.

I have said that this rule exists in all *presentative* benefices, and I confine it to these, for *donatives* are a very different species of property, and are governed by different rules. This subject is most clearly explained, and all the authorities referred to, in the very learned judgment of my brother *Littledale* in the Court below (a), and it is enough to say the result is, that in donatives the complete dominion over the vacant benefice and the freehold in it remains in the patron, together with the right to take the intermediate profits, until it is again granted out by him, to a new incum-

(a) 7 B. & C. 145.

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bent, in the nature of a new investiture. This freehold, in the case of the death of the patron during a vacancy, of course passes to the heir.

I do not propose to occupy your Lordships' time by citing all the authorities, to prove that the void turn of a presentative benefice, is a personal right or interest. They have been all referred to in the argument at your Lordships' bar, and in those in the Court below.

In some cases this interest is called "a *chose in action*;" *Leach v. Babington* (a); in some a "chattel;" as by *Periam*, Justice, in the *Queen's*, *Fane's*, and the *Archbishop of Canterbury's* case. (b) In others, as in *Fitz. N. B. Quare Impedit*. 34 N. and 3 *Keble*, 152. "a chattel vested." A "personal chattel;" *Vin. Abr. Executor*, Z. 2. pl. 4. *note*. A "chattel vested, and severed from the manor;" *Fitz. N. B.* 33. P. In one it is called "a personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy:" also, "a thing in right, power, and authority;" and also "a *chose in action*, and in effect *the fruit and execution* of the advowson, and not any advowson;" by six justices. *Stephens v. Wall*. (c) In 3 *Leon*. 256. "a power to present, and an authority annexed to the person." In *Digby v. Fitch* (d), *Warburton J.* said, "the presentment is the possession in *Quare Impedit*, as in rent, the receiving, in common, the taking of the profits." In *Brokesby v. Wickham* (e), it is also compared to rent. And this analogy will be found to be the most perfect; the advowson is the estate, which descends, may be conveyed, limited, and escheats as such: the presentation, is the mode of enjoyment, the profit or rent of the estate; and like the rent or profit belongs to the owner of the estate at the time it accrues in the nature

(a) *Cro. Elix.* 311.

(b) 4 *Leon*, 109.

(c) *Dyer*, 282.

(d) 1 *Brownlow & Goulshrough*, 167.

(e) 1 *Leon*, 17.

of a personal chattel, distinct and severed from the inheritance: it belongs to him, not as owner, but as an individual.

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These authorities, in which the right of presenting on a void turn is treated as a personal right, are not confined to the case of passing to the executor, in the event of the patron's death during vacancy. There are many others, in which it is so treated. A termor in the advowson has a right to present, though after the term has expired, to a vacancy which happened during the term: *Fitz. N. B. Quare Impedit*, 33 A. Bro. *Presentation à l'Eglise*, 22.: and he would be equally entitled to the rents in arrear, of an estate granted for the same term. A husband is entitled to present after his wife's death on an avoidance during his wife's lifetime of a church of which she had the advowson: *Co. Litt.* 120 a. Bro. *Present. à l'Eglise*, pl. 22.: as he would also be entitled to the arrears of rent of his wife's estate. It is incapable of being assigned, *Dyer*, 238., or released by one joint tenant to another, 1 *Leon*, 167., as arrearages of rent are. If the patron be outlawed, in trespass, the church being void, the king is entitled, as to the other goods and chattels of the outlaw, and as he would be to the rents of his lands. Bro. *Presentation à l'Eglise*, 22. *Fitz. N. B.* 34. Q. All these are cases of advowsons in lay hands; but a void turn is treated in one case as a personal right, disannexed from the advowson when in spiritual hands. In *Fitz. N. B.* 34. N, it is said, that if a vicarage happen void, and before the parson present, he is made a bishop, &c., yet he shall present unto this vicarage, *for it was a chattel vested in him*.

All the authorities which I have cited are uniform, and many others might be adduced, to shew that the right of presentation is a personal right, disconnected from the estate of the advowson, and belongs to the person of the

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owner; and the last applies to the case of a spiritual person, and is in point.

But, on the part of the successor, it is argued, so far as his case is put upon the ground of authority, that the last case is single and unsupported; and that all the others are anomalies; that, in truth, the general rule is, that the void turn continues part of the advowson; that these exceptions have been introduced in all cases of lay patronage without any reason at all, though they have been too firmly established by authority to be now disturbed; but that the *general rule* still continues, and ought to be maintained, in the case of spiritual advowsons. Of course, the burthen of proving the existence of this rule lies on those who assert it; but the singularity of this argument, which was urged at your Lordships' bar, is, that whilst it treats all the cases in the reports and books as anomalies and exceptions to a supposed general rule, without the least authority for stating that they are exceptions and anomalies, it asserts the general rule, as will be found, without any authority for it, for there is no one case or *dictum* cited, which makes any mention of such a general rule.

But it is contended that it must be *implied* that there is such a rule, from four cases, which lead to the inference that the next turn continues part of the advowson.

One was, where the incumbent was also patron, and died seised in fee of the advowson, the heir was held entitled to present; and it was said that this must be, because the turn continued a part of the advowson. *Hall v. Bishop of Winton.* (a) But this case was decided, not on the ground of the next turn continuing parcel of the advowson; but expressly on the ground, that the descent to the heir, and the fall of the avoidance

(a) 3 *Lev.* 47.

to the executor, happened in one instant, and that the elder right should be preferred. The general nature of the interest which arises on an avoidance was distinctly admitted, and the right of the heir put upon a ground which is perfectly consistent with it.

Two other cases, from which this inference was raised, were those referred to in *Co. Litt.* 388 a. A bishop dies, a church being vacant in his life, and after his decease, the king shall present, and not the executor or administrator. So, also, in the case of the death of a tenant by knight service in *capite*, with an advowson appendant, which has become void in his life, his heir within age, the king presents, and not the executor or administrator; and this is said to be another proof that the void turn is still a part of the advowson. But though the king omit to present till he restore to the bishop his temporalities, or till the heir be of age, and sue his livery and hath it, the king still has the right to present; and this shews that in neither case the void turn *remains parcel* of the advowson, and belongs to the person who is owner of it. For both these positions, *Fitz. N. B.* 83. N. O. is an authority. Besides, it is said in *Co. Litt.* 388 a., that if the land be holden of a common person, in that case the executor shall present; but if the void turn were still part of the advowson, why should not a common person, as well as the king, who both take the advowson, exercise this right? It is quite clear, therefore, that neither of these can be explained by the supposed rule. We must look for another explanation. Both are clearly referable to the king's prerogative, which entitles him, in these special cases, to this personal interest. It should be observed, also, that *Roll. Abr. Presentation à l'Eglise, C. pl. 4.* and *Bro. Presentation. à l'Eglise, 10.*, which state that the king is entitled, both state that the bishop's executors are not; which

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shews that these great lawyers, thought the void turn was disannexed, and that the successor, at all events, had no right whatever.

A fourth case, from which the inference of this continuance of the void turn, as part of the advowson, was deduced, was that of a conveyance by the crown of an advowson, whilst the church was void, which, according to *Fitz. N. B.* 33. N., passes the void turn. Admitting that authority to be correct (and it is doubtful, from what is said upon this subject in *Dyer*, 328 *b.*), it is a question only as to the effect of the *king's grant*, and never could have arisen, unless the void turn had been severed and distinct from the advowson.

The case, in truth, amounts to no more than this, that the grant of an advowson, which involves in it every present and future right of presentation, passes in the case of the crown, the next presentation, to a void living, which the crown *can grant* (*Dyer*, 283 *a.*), though, in the case of a subject, it would not; for a subject cannot grant over such a personal right.

None of those four cases, therefore, which are relied upon as proofs of the existence of this supposed rule (and there are no others), in reality do prove it at all, and all are capable of being satisfactorily explained upon another supposition.

There is, therefore, as it appears to me, a great body of authority in favour of the position, that the void turn is a personal right *in all cases*; and when the cases are investigated, a total absence of authority to the contrary.

If it be conceded that this interest is of a personal nature, and dissevered from the advowson *in all cases*, it must be contended, that, in the case of a spiritual person, this personal interest or chattel will go by succession. But that is a violation of the established rule, that a corporation

poration sole cannot take a chattel by succession, whether in possession or action. *Fullwood's case* (a): and no authority can be cited that this special chattel interest is an exception.

I have shewn, therefore, that there is no authority for the alleged general rule, that the void turn continues annexed to the advowson, and is not of a personal nature; and if it be of a personal nature, there is not only no authority, but it is against the rules of law that it should pass to a successor.

Upon the hypothesis in favour of the successor, all the decided cases are anomalies; upon that made by the personal representatives that the right of presenting is, in all cases, both of lay and spiritual patronage, a personal interest, we have an uniform and consistent system. As this right, when in lay hands, is analogous to rent in the case of land; so it is when the advowson is in spiritual hands; and as a parson or prebendary who resigns, or his executor, when he dies, is clearly entitled to arrearages of rent and profits which accrued before his resignation or death, (*Fitz. N. B.* 122. D., 120. L., 19 *Hen.* 6. 44.), so he or his personal representative ought to be entitled to the right of presenting which fell during the same period.

Besides, if this anomalous principle is introduced on the ground of the spiritual character of the prebendary, what is to be said of it whilst the prebend was in lay hands, which it clearly might have been before the act of uniformity, according to the case of *Bland v. Maddox*. (b) Is the void turn to be dissevered or not, according as the prebendary is a layman or ecclesiastic?

It is said, that this patronage is so annexed to this spiritual corporation as to be incapable of separation from it; but not only is there no authority for this po-

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(a) 4 *Rep.* 65.(b) *Cro. Eliz.* 79.

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sition, but many precedents are against it, in which bishop, and other ecclesiastical corporations sole, have granted away their right to laymen, which grants have been considered good against themselves. I need not refer your Lordships to the authorities, further than by saying, that they are collected in the reported cases in the courts below.

And, indeed, I am at a loss to see, in what way the alleged difference, if there be one, between the qualities of an advowson in lay hands and in those of a spiritual proprietor, could have arisen. It is highly probable, to say the least of it, that all rectories were originally created in the hands of laymen, who received the patronage from the bishop in lieu of those lands which they granted on the foundation or endowment of a church; and if this be so, what is there to raise the presumption that when they afterwards granted these advowsons to the church, they wished them to have new properties and qualities different from those they had in their own hands; or, if they did wish it, what power had they to communicate them? They could no more alter the rules of law and make chattel interests be taken in succession by a corporation sole, than they could make the estate in a freehold descend to executors. Succession in a body politic is inheritance in a body private (*Fulwood's case*); and no grantor can, however much he may wish it, limit his estate against the rules of law.

And supposing that there were instances in which a bishop or other ecclesiastical person, and not a layman, had originally founded or endowed a church out of the lands belonging to him in that character, and became the proprietor of the advowson which he or his successor had granted to the prebendary, the same difficulty occurs in proving the intention of the donor, and a similar difficulty in carrying that intention into effect; and if these difficulties are overcome, the alleged difference in
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the quality of lay and spiritual advowsons must, at all events, be confined to those very special cases exclusive of all others.

The next proposition which the authorities establish is, that all personal rights and interests of the nature of property, and which are not extinguished by death, vest, on the decease of the owner, (with some few exceptions), in his personal representatives.

The executors or administrators are not constituted for the purpose of paying the debts of the deceased; their liability to those debts is a consequence of their representative character. *Litt. s. 337.* says, that "executors represent the person of their testator." So *Yelverton*, 103. is to the same purpose: "He is in law the testator's assignee." *Wentworth Off. Ex.* 100.: As to estate committed to his trust, he may charge others and be charged himself, sue and be sued, as the testator himself might. *Shephard's Touch.* 401.: Executors take, therefore, all the personal estate and interest of the testator, and are identified with him in respect to all personal property; but their obligation to pay debts is only to the extent of the value of those effects which are valuable. They have all the deceased's effects, but they are liable only for assets.

It is a fallacy to suppose that they take nothing but what is valuable, and therefore do not take rights of presentation to void benefices: a fallacy which has led to the argument that all the cases in which a personal representative has taken a void turn, which certainly cannot be sold, are unreasonable anomalies.

The 31 *Edw. 3. c. 11. s. 1.* puts administrators, who are the deputies of the ordinary, on the same footing as executors. *Vide New Sheph. Touch.* 401.

To this rule, that the personal representatives take all the personal rights of the deceased, of the nature of property, there are some exceptions which the common law,

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law, in the case of private individuals, or the king's prerogative right, has established.

Chattels touching the realty; deer in a park; fish in a pond; evidences of title; heir-looms, which go to the real representative, and the analogous case of the ornaments of a bishop's chapel, which pass to the successor, are of the former description. The right of the crown to the void turn, in the case of the tenant in *capite*, and the bishop, stated by *Coke*, p. 388. *a.*, are instances of the latter; and it is to be observed, that both those instances are put by him as exceptions to the general rule "that chattels, as well real as personal, shall go to the executors or administrators." None of the excepted cases have any bearing upon this; there is no mention any where made of an exception of the right in question when in spiritual hands; and it would violate the rule of law as to succession by a corporation sole to chattels if it did.

My Lords, I must own that it appears to me to be quite clear that if this case is to be decided, as I conceive all similar cases ought to be, according to the rules deduced from former decisions, and legal precedents and principles, there is no doubt as to the right of the personal representative of the prebendary to present to the void living. These rules cannot be shewn to be contrary to sound reason and just policy. We are not enquiring whether other rules might or might not have been more wise or reasonable, and whether the heir in the case of lay property, and the successor in that of spiritual property, might or might not have been likely to exercise the right of presentation more beneficially to the public interests. If such an alteration is proper, and it is not my province to enquire whether it is, it must be made by the legislature. What ground has a Judge, says Lord Keeper *Henly*, to alter the law because he cannot approve the reasons that others have given,

given, or may not be able to assign a satisfactory one himself? At present the system is, at all events, uniform and consistent, and uniformity and consistency ought not to be lightly sacrificed. The law of *England*, which has treated from the first, advowsons as property, the founders or benefactors of churches having had the patronage granted to them as property for a valuable consideration, has not relied upon the person or character of the patron for the due exercise of the trust; but has adopted other securities for that important purpose. The incorrupt exercise of the trust is secured by the penalties against simony, and the selection of a fit clerk by the examination of the ordinary. Subject to these provisions, it has left the patronage of churches to descend, be limited, and enjoyed like other real property.

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For these reasons, I am of opinion that the right to present to the void turn passed to the personal representative of the deceased prebendary.

GASELEE J. This, my Lords, is not the first occasion on which my attention has been called to this question. Your Lordships are aware that in the case out of which it arises there have been conflicting judgments in the Courts of King's Bench and Common Pleas, and that full reports of these judgments are to be found in 3 *Bingh.* 223., 11 *B. Moore*, 139., and 7 *Barn. & C.* 153.

The case has been since very fully and ably argued at your Lordships' bar, and in the course of the several discussions which it has undergone, I believe every authority that can be brought to bear upon the subject has been cited; and they are all mentioned in the Reports I have alluded to.

I shall therefore not trouble your Lordships with going through them at length, but shall state, as shortly

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as I can, the grounds upon which I found my answer to your Lordships' question in the affirmative.

It is extraordinary that although cases similar to the present must have happened, there are no traces of any such having been made the subject of legal investigation; nor upon the best enquiry that I can make, have I been able to ascertain what the practice in such cases has been.

It is admitted that the general rule with respect to presentative livings is, that if after a vacancy the patron of the advowson dies without having presented, the right of presentation to the vacant turn belongs to the personal representative, and not to the heir of the patron: and the reason given in the books for this is, that it is a fruit fallen, a chattel severed from the inheritance, or, in other words, that the moment a church becomes vacant the turn is separated and disannexed from the advowson, and is vested in the person of the individual to whom the advowson at that instant belongs; see 4 *Leon.* 109. *Fitz. N. B.* 39 *P.* 34 *B.* and 34 *N. P.*, and many other authorities; and it is so far considered as disannexed from the inheritance, that the grant of an advowson during the vacancy does not carry the vacant turn. Where the husband is tenant by the curtesy, and the church becomes void during his life, and he dies before it is filled up, yet the heir of the wife, who takes the advowson, shall not have the vacant turn, but the husband's executors. So, where the wife is seized of the advowson, and the church being void, dies without having had issue, so that the husband is not tenant by the curtesy, yet the husband shall present to the vacant turn, and not the heir of the wife. Again, in the case of a termor, if a vacancy happens during the term, and he does not fill it up during the continuance of the term, he is entitled to do so after its expiration. And there are many cases which decide, that although the grant of the

the next presentation be made to a man and his heirs, yet it shall go to his executors and not to the heir.

But it is said there are exceptions to this general rule : one of which is, that where the patron is the incumbent, the vacancy occasioned by his death shall not be filled up by his executors, but by his heir upon whom the advowson descends ; and for this is cited the case of *Hall v. The Bishop of Winchester*. (a) But what is the reason given by the Court for this ? It is, that all is done in an instant, the descent to the heir and the falling of the advowson to the executor ; and that, where two titles do accrue in the same instant, the elder shall be preferred. As in the case of joint tenancy, where one devises his part, the title of the devisee and of the survivor happens in the same instant, and the title of the survivor being the elder, shall be preferred.

Another exception is where the patron is a bishop, and entitled to the living in right of his see ; in which case, if the bishop dies after the vacancy, and before it is filled up, the king, and not the executors of the bishop, shall present. Various reasons are given in the books for this ; one is said to be, for that nothing can be taken for the presentation, and, therefore, it is not assets. This surely cannot be the reason, for if it were, it would apply to every case, and entirely do away with what is admitted to be the general rule in presentative livings. Another reason given is, that it is a spiritual trust ; and, consequently, on the vacancy of the see vested in the king as the supreme patron and head of the church. Is that the reason ? The vacant turn is, by all the authorities, considered as part of the temporalities of the see. The king takes it as such. It passes to a third person by the grant of the temporalities, and nothing can be more strong to shew that it is considered as disannexed from

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(a) 3 Lev. 47.

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the advowson than that if the vacancy remains unfilled, not only until after the consecration of the new bishop, but after restitution of the temporalities, the vacancy is still to be supplied by the king or his grantee, and not by the new bishop, to whom, if not considered as so disannexed, it would naturally pass as part of the advowson. The rights of the crown upon this subject are stated in *Watson's complete Incumbent*, cap. 9. p. 48. If the rule be, that all ecclesiastical patronage is a spiritual trust, and cannot be transferred into lay hands, what becomes of the case of an archbishop's options, which are to all purposes considered as chattels and his personal property. He may devise them, and if he does not they pass to his personal representative. It is true, that after the vacancy happens, the options cannot be sold; and, although it cannot be supposed that any archbishop would sell it during his lifetime, yet there may be cases in which his executor or administrator might be compelled to do so before a vacancy happens; as, for instance, on the application of a residuary legatee, or one of the next of kin.

A distinction is attempted to be made between ecclesiastical and lay patronage, because it is said that in the latter the church is secure from an improper person being presented by the bishop's right to refuse the party presented. But there is, in fact, no ground for this distinction. In this very case the administratrix claims only to present. The bishop of *Lincoln* is to judge of the fitness of the person presented. And so it is in all presentative livings, whether of ecclesiastical or lay patronage. The bishop of the diocese in which the benefice is situate, is to examine and decide upon the fitness of the presentee. I am not aware of any authority which has determined that a grant by an ecclesiastical patron of a presentative living, to which he was entitled in respect of his ecclesiastical preferment, is void, although, of course, he cannot grant it beyond his

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own life. In *Watson*, p. 53. it is said to have been held, that a grant by a bishop of an archdeaconry for twenty-one years, though void against the successor and the king, is good as against himself. And many of such grants in ancient times are to be found in the books of entries; I will not trespass upon your Lordships' time by stating them at length, but merely refer to the books where they are to be found: *The King v. The Abbot of — and Another* (a), *Stanhope v. Bishop of London and Others* (b), *Webster v. Archbishop of York and Woodroffe* (c), *Hill v. Bishop of London and Others* (d), *Adamson v. Bishop of Lincoln and Others* (e), *Overton v. Syddal* (g), *Byng v. Bishop of Lincoln* (h). Although there does not appear to have been any decision in these cases, yet Mr. Justice *Ashhurst*, in 2 *Term Rep.* 636., says that the forms of legal proceedings are evidence of what the law is. In one case, indeed, that of *London v. Southwell* (i), the pleadings of which are in *Winch's Entries*, 810., it was held that an advowson did not pass by a lease made by a prebendary, not because the grant of an advowson by a spiritual person was illegal, which, if the law were so, would have been a short answer to the case, but because the words of the lease were not sufficient to comprise it. And in the case of *Armiger v. Bishop of Norwich and Holland*, the Court said, that the grant by a bishop of an advowson, though void under the 1 *Eliz. c. 19.* against the successor and the queen, was good against the bishop whilst he continued to hold the see. And in *Poyner v. Charlton* (k), it appears that the grantee of a dean and chapter of the next avoidance recovered it in *quare impedit*. Much stress has been

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(a) *Vet. Intr.* 110.(b) *Winch.* 285. *Hob.* 237.(c) *Co. Ent.* 507.(d) *Co. Ent.* 508.(e) 2 *Brown*, 233. *Rastall*,(g) *Co. Ent.* 122.(b) *Winch.* 853.(i) *Hob.* 304.(k) *Dyer*, 135.

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laid by the counsel for the Plaintiff in error, in the case of *Repington v. Governors of Tamworth School* (a), in which it was held, that in the case of a donative, the right of donation descends to the heir, and that the executor has no title, which the Court said he would have had if it had been a presentative living. This case is so very miserably and scantily reported, that it is impossible to ascertain the grounds of the decision. It does not militate against the general rule which I have stated in the early part of what I have addressed to your Lordships' notice, as I have above stated, the Court in giving their judgment in the case of *Repington v. The Governors of Tamworth School*, said, would have governed this case if it had been one of a presentative living.

Another ground of objection taken to the Plaintiff's claim is, that admitting the vacant turn to be a chattel, still the Plaintiff is not entitled to present, because it is said the prebendary is a sole corporation, and that a sole corporation cannot take a chattel by succession, except in the case of the king.

That a sole corporation, except in the case of the king, cannot take a chattel in succession, is true; but what appears to be the fallacy of the argument in this part of the case is, that the prebendary did not take the void turn by succession. The advowson goes to the next prebendary by succession; and if the void turn went with it, it must be as a part of the advowson, for if disannexed from it, and a chattel, as it is stated by the authorities to be, he could not take it. It appears to me, however, that the moment the vacancy happens, it becomes a chattel vested in the then prebendary in his individual capacity, and passes to his representatives in the same manner as rent or any other fruit of the prebend which has accrued or fallen during his lifetime;

(a) 2 *Wilson*, 150.

and for this I would refer to the case cited in Mr. Justice *Holroyd's* judgment, from *Co. Lit.* 99 *a.*, and to the passage in *Fitz. N. B.* 34. N., that if a vicarage happen to be void, and before the parson presents he be made a bishop, yet he shall present to the vicarage, because it was a chattel vested in him.

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With respect to any distinction that arises from the form of the presentation of the last incumbent, which is set out in 3 *Bingh.* 279., supposing your Lordships can take notice of it, which I apprehend your Lordships cannot, framed as the record in this case is, in which the patron states himself to be prebendary of the prebend of *South Grantham*, anciently founded in the cathedral church of *Sarum*, and in right of that prebend the true and undoubted patron of the rectory of *Welby* in the county of *Lincoln*, in the diocese of *Lincoln*, I am not aware of any determination that so much need be stated, or that the common form which is to be found in 1 *Burn. Eccl. Law*, 150., would not be sufficient. That form runs thus: "I Sir *W. P. B.*, true and undoubted patron of the rectory of the parish church of _____, in the county of _____, and in your diocese of _____, now vacant by the death of *A. B.* the last incumbent thereof," &c.; but though that form be necessary where the presentation is made by the prebendary himself, it does not follow that, because the administratrix cannot use that precise form, she cannot present at all. In the common case the executor or administrator cannot use the precise form used by the patron. It must of course be adapted to the particular situation of the party. In considering the answer I shall give to your Lordships' question, I have confined myself to the matters contained in this record. Of the several documents stated in the judgment of the noble Lord who was Chief Justice of the Court of Common Pleas when the case was determined in that court, we have no judicial notice. They were not, they could

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not, have been given in evidence upon this record. Nothing decisive can be drawn from the general history of the foundation of prebendal churches, or the appropriation of livings to them; there does not appear to have been any general mode of appropriation; they are stated to have been made to the body, or to some one particular member of it. Of what was the course pursued in the case before us we have no judicial notice, nor any evidence, either judicially or otherwise, respecting the will of the founder. Under these circumstances, therefore, in a case admitted to be of the first impression, and upon which no precise authority can be found, it seems to me that the safest course is to follow the general rule applicable to presentative benefices. My humble answer to your Lordships' question is, that the right of presentation belongs to the personal representative.

LITLEDALE J. concurred with the majority of the Judges; intimating, that he saw no reason for altering the opinion he gave in the court below.

PARK J. When the case out of which the question propounded by your Lordships for the opinion of his Majesty's Judges first came before the Court of Common Pleas I took infinite pains by reading much in ecclesiastical history, by consulting our text writers (for as to decided cases there are none), and after that, after hearing two very elaborate arguments at the bar, and long consultations which the then Lord Chief Justice of the Common Pleas, I came to the conclusion that *Mrs. Rennell*, as administratrix of her deceased husband, was not entitled to that which she claimed; and in giving which opinion I am happy to say I concurred with Lord Chief Justice *Best* (now one of your Lordships' house), and Mr. Justice *Burrough*, a man who for legal knowledge and sound and correct understanding was of no ordinary size. To
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err in judgment with two such Judges, if err we did, can be no disgrace to any man. When this case was removed from the Common Pleas into the King's Bench by writ of error, three of the learned Judges of that Court reversed the judgment of the Court below against the opinion of Lord *Tenterden* the Chief Justice. So here again the Judges were three to one against the judgment; thus four Judges were opposed to four, and therefore we need not wonder that this case has found its way into your Lordships' house. I have again heard this case argued with great learning and ability at this bar. I have considered every argument, and studied the judgments of my different learned brethren, and the authorities they have quoted; and though I do not deny that my mind has now and then fluctuated, which great learning and great ingenuity at the bar will frequently occasion, I have arrived at the same conclusion I did in the Common Pleas, namely, that the administratrix of Mr. *Rennell* is not entitled to the presentation to the church in question, the advowson of which belonged to Mr. *Rennell* as prebendary in right of his prebend in the church of *Salisbury*, and that is the answer I propose to give to your Lordships' question. Before I enter into the argument, which must be almost a repetition of what I formerly delivered, and which is now in print, I hope I may be allowed to assert, that had any thing passed either in the Court of King's Bench or in this House which had convinced my understanding that my former opinion was erroneous, I should be one of the first to acknowledge my mistake and to retract my judgment. I have done so on two other occasions in this House, and shall never be ashamed to make such an avowal, for none but a weak, nay a wicked mind will persist in error if the understanding and more matured reflection convince a person that he has before formed a wrong judgment. It is admitted, then, that it is

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not necessary for your Lordships to decide upon this record who has the right of presentation to the living in question. The point is, whether *Mrs. Rennell*, as administratrix to her deceased husband (which must be in his *natural* capacity), has established her claim to a living the advowson of which belonged to her deceased husband *in right of his prebend of South Grantham*? Not that upon that question I have not a clear opinion, for I do not think it goes to the crown, as it was surmised it did, but I think it goes to his successor in the stall or prebend in the church of *Salisbury*. A point has been much insisted and argued upon, which seems to me to be the foundation of all the misconception in this case; but it is a point upon which there is no difference of opinion, namely, that in the case of lay patronage in the events which have happened, the patron dying after the actual vacancy, the personal representative, and not the heir, would have been entitled to the presentation, because in merely lay patronage the church having become vacant in the lifetime of the last possessor, it thereby became a chattel, went to the executor as personal property, being severed, and therefore no longer remained with the advowson as a part of the possessions of the heir of the person seised of the advowson; and in that case it is a mere question between the representatives of the same patron. Of this law there is now no doubt, grounded upon the authority of decisions and of a practice long known, although I own I cannot state or discover any reason very satisfactory to myself for deciding that the void turn in the lifetime of the patron is a mere chattel, when the question arises between the heir and the executor of a natural person. For Lord *Coke*, in his first *Inst.* 388. *a.* says, "that such a turn is not assets," and therefore nothing can be made of it for the payment of debts: therefore the rule between heir and executor cannot depend upon considerations of that sort.

sort. But I agree with Lord *Tenterden* that the want of a satisfactory reason is not a sufficient ground for overturning a practice long established. This, however, in my way of considering this case, leaves the point still open; and I cannot find from any of my learned brethren in any court who have judicially given any opinion, nor from any industry displayed at the bar in the courts below, or in this House, nor from my own laborious reading and research upon this subject, that in any court in *England* has such a case in specie ever been decided. The question is, in my view, whether lay and spiritual patronage are not to be considered as standing upon a very different footing. That facts similar to those which have occurred in this case must have existed many hundred times, no man can doubt; and that ecclesiastical patrons thought it clear one way or other, must be the reason why no decision upon such a point is to be found in our books. I myself verily believe that till this claim was set up no spiritual person ever imagined that those rights which a man held *jure ecclesiæ* merely could be exercised by others after his death, the words of the grant to such a person being "we duly and canonically invest *you* (not your executor, &c.) in and to the said prebend and canonry, and invest you with all and singular the rights, members, privileges, and appurtenances thereunto belonging;" otherwise one cannot but think that in 500 or 600 years such a claim would have been contested and the point by some legal decision ascertained. No distinction can be more broadly drawn in the whole law of *England* than that between the lay and spiritual function and character; even the variety of cases and statutes quoted by my learned brothers, who have gone before me, and which I shall not fatigue the House by wading through, establish the distinction. Certain personal

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rights belong to one of these characters which do not belong to the other.

The transmission of church property also stands under very different considerations from the transmission of lay property. For instance, a person seised of a freehold right is said to *be seised in his demesne as of fee*: a clergyman, as in this declaration, is said to be seised in his demesne as of fee *in right of his prebend or canonry*. I cannot deny that many of the evils and absurdities, which I contemplate by giving effect to Mr. Rennell's claim, will also arise in lay patronage; because it must be admitted, that by giving the presentation to the personal representative of a lay patron, it may fall to a very inferior person to present; but this evil arises out of the unfortunate situation in which lay patronage stands, but which, I contend, ought not to be carried one single point further, especially where the rule hardly applies, the lay patron acting in his *natural*, the other in a *politic* or *corporate* character.

What was the origin of lay patronage? I have looked much into it, and the result of all my researches is this, — that it arose in the infancy of society, and under these circumstances, that though the appointment of fit persons to officiate throughout a diocese was originally in the bishop, yet when lords of manors and other great men of old were willing to build churches, and to endow them with glebes and mansion-houses for the accommodation of fixed and resident ministers, the bishops, for the encouragement of such pious undertakings, were content that those munificent persons should have the nomination to churches so built and endowed by them, reserving to themselves still the right of judging of the fitness of the persons so nominated. “*Si quis ecclesiam cum assensu diocesani construxerit, ei jus patronatus acquiritur;*” and hence have followed *all* the

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consequences to a mere lay possession or property. Chattels, where chattels go to the executor ; the rights of the heir to the heir, in cases where, by the common law, the rights of the heir were paramount to those of the personal representative. But still the question recurs, Do those rules apply to the spiritual patron, and can the rights and property which belong to his politic character be dealt with as if he were a private person ? Of this there can be no doubt, that in our law, now, and, I hope, ever, lay and spiritual patronage will be upon a very different footing.

Bishop *Gibson*, in his *Codex*, p. 757., decisively makes this distinction. That very learned prelate says, — and his authority upon subjects of this nature has always been considered as entitled to great respect, — “ The right or property which the patron has in an advowson will not warrant a plea, as it is in temporal property, (of course, therefore, the bishop is contrasting it with an advowson in spiritual hands,) that he is seised in *dominico suo ut de feodo*, but only *de feodo*.” The reason of which is given by Lord *Coke*, *Co. Lit.* 17., because that inheritance (viz. an advowson) savoureth not *de domo*, and cannot serve for sustenance either of himself or his household, nor can any thing be received of the same for defraying of charges. And in the case of *London v. The Church of Southwell* (a), where the words of the lease were, commodities, emoluments, profits, and advantages to the prebend belonging, it was adjudged that the advowson did not pass by the said words ; because, said the Court, all the words used imply things gainful, which is contrary to the nature of an advowson regularly. Why is this so ? I say it is so because an advowson in the hands of a sole corporator, a churchman, is not a matter of profit, but of naked trust merely ;

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and the churchman who has an advowson appendant to an ecclesiastical dignity, has it as a mere matter of trust, in *jure ecclesiæ*, which he can only exercise for the benefit and advantage of the church of which he is a member, and of which only as a member of the church, could he have a right to dispose. Mr. *Rennell*, therefore, had only a right as member of the church of *Salisbury*, and the moment he expired, all his rights as a member of that church ceased. Suppose, instead of his death, he had resigned his prebend in *South Grantham*, having omitted to fill up this living, could it have been for a moment alleged that he still had a right to it as *fruit fallen* during his holding the prebend.

Am I right in stating to your Lordships that this is a matter of trust only, for upon that, much of the argument has turned? I wish to found myself again upon the authority of Bishop *Gibson*. On this point, in pp. 757, 758., founding himself on the authority of Lord *Coke*, even in cases of lay guardian in socage, the patron shall not present to an advowson, because he can *take nothing* for it, and by consequence he cannot account for it; and by the law he can meddle with nothing he cannot account for. Which said doctrine and the plain tendency thereof are exactly agreeable, not only to the nature of advowsons, which are merely a *trust* vested in the hands of the patrons, by consent of the bishop, *for the good of the church and of religion*, but also to the express letter of the canon law, the rule of which is, *jus patronatus cum sit spirituali annexum vendi vel emi non potest*. In another place, the bishop says, they are *mere trusts for the benefit of men's souls*.

If this be so in the origin of these things, even as to lay patronage, however the exercise of the right of selling advowsons and next presentations, when the churches are full, may have grown up, am I not right in stating to your Lordships that great difference exists between
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lay and ecclesiastical patronage; and though it may now be impossible to shake the custom of making profit of advowsons in the hands of laymen, the other has always been considered as a mere trust, to be exercised by the patron for the benefit of the church, for the due discharge of which he alone is to look, which he alone is competent to consider with a view to the welfare and advantage of religion, in this respect committed to his sole care, and upon which his personal representative may be absolutely unable to form a judgment.

It may appear to your Lordships a low and unfit argument to state to this house, but when I gave my judgment in the Court below, I thought, and I think so still, that it is one of vital importance to the interests of that church, which every good man must love and revere, and to which I have never received a specious answer, except that the same inconvenience may occur in lay patronage, and which I admit, — Suppose a prebendary dies insolvent as well as intestate, and that all his next of kin, as they probably would in such a case, renounced administration, and that his butcher, baker, or other inferior tradesman, being a creditor, took out administration: must such a person present? is such a person capable of forming a correct judgment of a person fit for the care of souls? and yet I defy the ingenuity of man to get out of the dilemma; for if *Mrs. Rennell* is to present, the butcher or baker must, under the circumstances supposed, have exactly the same right. I lament that the same consequences would follow in lay patronage, but I am quite sure till compelled by the judgment of your Lordships' house, I cannot consistently with my feelings to your Lordships nor to myself declaring a judicial opinion, advise that such lamentable consequences should be carried one step further. That the presentation now under consideration is not assets of value is quite clear; it may be a chattel, but in the hands

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hands of an ecclesiastic, a chattel of mere trust. It is admitted by every Judge and by every counsel that has spoken upon this subject, that there is a total silence of our law books during the whole period of our ascertained law of *England*, upon this precise point, although circumstances similar to the present must have existed many times, and this to me is a strong convincing proof that till these days of novelty no such idea was ever entertained upon this question, and I verily believe that no man now living ever before heard of such a claim being advanced. Nothing I think can be put in a stronger light than was done by my learned brother *Burrough* when this case was before the Court of Common Pleas. The allegations of this declaration are, that the late prebendary in his lifetime and at his death was seised of the prebend or canonry founded in the church of *Sarum*, with its appurtenances, to which said prebend the advowson of the said rectory of the parish church of *Welby* belongs, in his demesne, as of fee, in right of the said prebend or canonry. By the law of *England*, a prebendary or canon is an ecclesiastical sole corporation. As such he can have no heir, he can have no personal representative: as such, his prebendal rights or property cannot go either to his natural heir or to his personal representative. Where then must they go? to his successor. In their corporate capacities, in estimation of law, the predecessor and successor being one, it is a continuance of the same corporate body. A prebendary or canon is a corporator in two respects; in one respect, as a member of the corporation of dean and canons. He is one of the chapter, having *sedem in ecclesia et vocem in capitulo*: and he is a corporator sole as prebendary. In every relation in which he stands to the church, he is a corporator.

I do not presume to state to your Lordships any thing particular respecting the constitution of this canonry.
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of *South Grantham*, though much pains have been taken respecting it by Lord C. J. *Best* and Mr. J. *Burrough* in the Court below; because, though there be no doubt of the authenticity of the documents from whence their information was drawn, yet we are not judicially informed of the foundation of this particular prebend. When, therefore, in this declaration, the prebendary is said to be seised in his demesne as of fee in right of his canonry, it cannot be meant a seisin to him and his heirs; for, as a canon, he has no heir, it must therefore mean to him and his successors. We find, in all our law books, the same law that I have above stated as to ecclesiastical sole corporations, from the highest to the lowest order of the church. Thus it is always said, the freehold is vested in the spiritual incumbent; but if we could suppose it vested in him in his natural capacity on his death, it might descend to his heir, which cannot be; the law has, therefore, wisely ordained, that the spiritual person, as such, shall never die, any more than the king, by making him and his successors a corporation. By which means, all rights are preserved entire to the successor: for the present incumbent of a spiritual charge and his predecessor, who lived centuries ago, are, in law, one and the same person; but if the personal representative, or even the natural heir were to intervene, the succession would be broken. 1 *Black. Com.* 470.

The position of Lord *Tenterden* agreeing with the majority of the Court of Common Pleas, though differing from his own more immediate brethren, has put this case in a strong and luminous point of view. "It is clear," says his Lordship, "that the administratrix cannot present in right of the prebend, because the prebend is not vested in her. If, therefore, she be allowed to present, she must present in a right different from that in which the intestate would have presented, and this will not be conformable to the general rights of an administrator,

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ministrator, which are those only that belonged to the person or personal property of the intestate. She is the administratrix of the personal rights and property of the intestate; but I find no authority for saying that she is the administratrix of his politic rights or property also. If, in the case before the Court, it be held that the administratrix is entitled to present, it cannot be denied that a right generally annexed to a prebend will, in the particular instance, be exercised not merely by a person who has not the prebend, but by a person claiming as if he from whom the title is derived, and who had the advowson in his politic capacity only, had in part held it in his natural capacity; a decision to this effect will be contrary to the nature of the right."

Some stress was laid in arguing this case upon the stat. of 21 *Hen. 8. c. 11.*, and I own I was at first impressed with the argument arising upon it. But, upon considering the statute, and the motive for making it, it now appears to me to have no bearing upon the case. The statute was made at the dawn of the reformation; and it appears that the then heads of the church, following in that respect the example of the see of Rome, exercised or endeavoured to keep in their hands the temporalities of the church, which belonged to them in their corporate character, whether aggregate or sole, an unreasonable time for their private benefit, to the great ruin and impoverishment of persons appointed to livings: the statute deprived them of that right, and gave the benefit to the new incumbent from the death of the last, and to the executors of such new incumbent if he should happen to die before he realised those interests which the statute thus gave to him. Much stress has also been laid, both at your Lordships' bar and at the bar of the Courts below, by the options of the archbishops, which I admit are allowed to be the subject of devise, and may go to executors. But, I answer, they
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are anomalies in the law, and the exception proves the general rule. They were originally, Mr. Justice *Blackstone* thinks, derived from the legative power formerly annexed by the popes to the metropolitan of *Canterbury*, and that right has been continued to the archbishops in their respective provinces of *Canterbury* and *York* even after the power of the popes has ceased in this country. But all these anomalies, I again repeat, support my general argument to shew that the rights of lay and ecclesiastical persons stand upon a totally different foundation, and that the law, attaching as it may upon property of this description in the hands of a lay person, does not attach upon the same species of property in the hands of one who holds *jure ecclesiæ*.

The case from 2 *Wils.* 150., *Repington v. The Governors of Tamworth School* has been much pressed, but it is difficult to ascertain the grounds of that judgment; it was a case of a donative, and Lord *Tenterden* thinks that the decision may have proceeded on the ground that the Court thought the rule as to presentative benefices in lay hands not well founded, and, therefore, not to be extended. A donative, however, is of a very peculiar nature; and, therefore, any decision respecting that may be considered as anomalous also. And, indeed, Mr. Justice *Blackstone*, speaking of donatives, considers them as exceptions; for he says, these exceptions to general rules and common right are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If, therefore, the patron (of a donative) in whom such peculiar right resides does once give up that right, (by presenting his clerk to the bishop, and procuring institution and induction,) the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever, and will, therefore, reduce it to the standard of other ecclesiastical livings. The ground of my opinion is, that

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that this species of interest in the case of spiritual patrons, whether aggregate or sole, is a mere personal trust to be exercised by him or them in the spiritual character which he cannot, consistently with his high duty if he be a sole corporator, either devolve upon another during his life, or at his death leave to be exercised by his heir or personal representative. He holds *jure ecclesiæ*, and in that right only; and if he had it not in that right, he could not have it at all; and when he dies, all his rights, powers, and privileges derived from the church absolutely cease as if he had never existed. This is no new notion; for that laborious and learned writer upon ecclesiastical law, Dr. *Burn*, in his vol. ii. 7th ed. p. 92., tit. *Deans and Chapters*, — Dr. *Godolphin*, having said that after the death of a prebendary the dean and chapter shall have the profits, but by the statute 28 *Hen. 8.* “the profits of a prebend during the vacation shall go to the successor,” — Dr. *Burn* reconciles this apparent contradiction thus, which bears on the discussion now before your Lordships: “the issues of those possessions, which he has in common with the rest of the chapter, (that is, a corporation aggregate,) shall after his death be divided amongst the surviving members of the chapter; but the profits of those possessions, which he has in his separate capacity as a sole corporation of himself, shall be and enure to successor.” Dr. *Burn* seems well supported in this distinction by the case of *Young v. Lynch*. (a)

Therefore, if a member of a chapter, which is an aggregate corporation, should die after a living had become vacant, it seems to me that his personal representative might as well contend for a voice in the chapter as to the filling it up, as that such representative might have it to himself exclusively, where a living belonged to him

(a) *Sayer Rep.* 84.

as a sole corporator merely; although Dr. *Burn* more justly says, it would go to the surviving members of the chapter; in the other to the successor. When Bishop *Gibson* says, "advowsons may be granted by deed or will," &c. he is evidently speaking of lay patronage only, for he adds, "This general rule is to be understood with limitations, that it extends not to ecclesiastical persons of any kind or degree who are seised of advowsons in right of their churches; all these being restrained as to bishops by stat. 1 *Eliz.*, and next by 13 *Eliz.* from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort advowsons and next avoidances, which are incorporeal and lie in grant cannot be." This distinction between laity and clergy pervades every page of our ecclesiastical history, and those well versed in the history of our venerable church will immediately recognise the justice and accuracy of those principles I have been endeavouring to establish. It is well known that, in the early periods of the church history of this country, the parochia or parish was the episcopal district. The bishop and his clergy lived together at the cathedral church, and all the tithes and oblations of the faithful were brought into a common fund for the support of the bishop and his college of presbyters and deacons, for the repair and ornament of the church, and for other works of piety and charity. At this time, and in the infancy of society, the stated ordinances of religion were performed only in these single choirs, to which the people of each whole diocese or parochia resorted, especially at the more solemn seasons of devotion. But, in order to supply the inconvenience of distance from the mother church, the bishop was wont to send forth some of his clergy to preach and dispense the word and sacraments; and these missionaries returned to give the bishop a due account of their labours and success. As the wants of
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society for spiritual instruction increased, and when the members of the episcopal college found it inconvenient to go forth, certain churches were allotted, some by laymen, (where they had the patronage given them, as a compensation for having built and endowed churches, and hence the origin of lay patronage, as before shewn,) some by the bishops to the prebendal body at large, some to one particular member of the body, all which may be seen by those who will take the trouble of looking into the ancient records of the church. Thus, these churches which were not in lay hands, became prebendals, and the supply of the duty was left to the aggregate corporation where the perpetual advowson was in the whole community of the dean and chapter; or to that sole corporation or single canon or prebendary, who was to have his prebend or exhibition from it. In process of time the representative curates, who were to account for their profits, and only to receive a small stipend for their services, were so ill paid, that the bishop obliged his clergy, who had such advowsons, to retain fit and able capellans, vicars, or curates (for these are all nearly of the same import), with a competent salary. This failing, the bishop again interfered, and obliged the clergy, (that is, the chapters, or the single prebendary, in whom the perpetual advowson in right of the chapter, or in right of his prebend, of which he was seised *jure ecclesiæ* was vested,) to make the presentation to spiritual persons to be endowed and instituted, who should thenceforth have no more dependence upon their spiritual than others had upon their lay patrons, with a competent maintenance to be assigned by the bishop. Much of this information may be inferred from the statutes 15 *Rich. 2. c. 6.* and the 4 *Hen. 4. c. 12.* I have not thought it necessary, in giving this detail to your Lordships, to refer to authorities; but what I have advanced will be found as the
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early history of our church in various books well worthy the attention of the curious, such as *Spelman de non temerandis Ecclesiis*, Bishop *Kennett on Impropriation*, and *Burn*, tit. *Appropriation*. But I have presumed to trouble your Lordships with this short history of the church, because it seems to me to prove incontrovertibly that what is thus vested in the church for spiritual purposes vests in them as a body politic, and can never be allowed to fall into the common private stock of the body at large, or of the individual sole corporator. And it will be found that what is said of the church at large is no less true of the church of *Salisbury*, as was luminously shewn by Lord *Wynford* and Mr. Justice *Burrough* in the court below.

Thus, then, an ecclesiastical person during his incumbency is entitled to all the profits that may fall of a chattel nature. But when a living falls vacant, to which he has a presentation in right of his church, as it is not a matter of profit, he merely presents *quasi* incumbent.

I have shewn to your Lordships, that the living in the present case was probably endowed out of the prebend, or the advowson attached to the prebend of *South Grantham*; in either case the prebendary, as a sole corporator for the time being, has the right of presentation; and upon the avoidance, he may present in right of his church; he presents as a trustee; the trust is personal, without profit, and cannot be transmitted.

How, then, can a private personal representative of a deceased prebendary, who dies after avoidance, but before presentation, claim the presentation? Is it that he makes it a chose in action, out of which to pay the debts of testator or intestate? That cannot be, for it is not assets. Does he claim to present because this trust had devolved upon him, or, as it were, became vested in, the testator or intestate? The trust has indeed devolved

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upon him, but not in his own right; but as the declaration truly states, in right of his prebend; the presentation is in him, not for his own use or benefit, but for the use and benefit of the church, confided to his spiritual, not to lay hands, for the dignity and ornament of the church, — a trust which he, and he only, must execute upon his great personal responsibility, for the cure of souls, and for the advancement of the interests of religion, — a duty which his personal representative in his natural capacity cannot, in law, be deemed qualified to discharge.

I fear I have fatigued your Lordships with the length of the argument; but as some of my brethren unfortunately differ from me, I could not satisfy my conscience upon the great, and, as I think, awfully momentous question, without satisfying your Lordships that I have not come to the conclusion I have done without most anxious consideration and deep research. The result, then, of my opinion is this, that whatever is attached to a spiritual, sole, politic body, sinks with the death or resignation of the party who possesses that right.

BAYLEY B. As the opinion I delivered when this case was before the Court of King's Bench is in print, and as I see no reason to vary from any of the grounds upon which that opinion was founded, I shall not be obliged to detain your Lordships at any considerable length. I take the general rule, with the single exception of benefices in the gift of bishops, to be, that when a benefice becomes vacant, the right to present is immediately detached from the estate which gives that right; it vests as a mere personal power of presenting in the individual who had the right of patronage at the time that vacancy occurred, and will continue in him and his personal representatives, let what will become of the estate which gave such right. Therefore, if the right to present to

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an advowson appendant, or an advowson in gross, when a vacancy occurs, be in tenant in fee or tenant in tail, and he die without presenting, though the estate will pass to his heir or devisee in the one case, and to the issue in tail or remainder-man in the other, the right to present will devolve upon his executor or administrator.

F. N. B. 33. P. 34. B. *Co. Litt.* 388. *Dy.* 283 a.

21 *Hen.* 7. pl. 6. *Bro. Present. à l'Eglise*, 34. If the

right to present when a vacancy occurs be in tenant *pur auter vie*, or in a *termor*, and before he present *cestuy que vie* dies, or the term expires, so that the estate which gave him the right to present is gone, that right nevertheless remains in him, and he may still present.

F. N. B. 34 B. *Bro. Pres. à l'Eglise*, 22. Again, if hus-

band and wife be seised in fee or in tail, or in right of dower, in right of the wife, and the church become void, and the wife die before the husband present, though the fee descends upon her heir, or the estate tail passes to the heir in tail, or the estate in dower ceases, the right to present remains in the husband. 21 *Hen.* 6. B.

38 *Hen.* 6. 36. B. 14 *Hen.* 4. 12. *Bro. Pres. à l'Eglise*,

pl. 22. *Co. Litt.* 120. And if a vicarage become vacant, and the person to whom the right of presenting belong be made bankrupt (whereby his right in the patronage ceases,) he shall nevertheless present.

F. N. B. 34. N. So, had Mr. *Rennell* been presented to a bishopric, would he have lost the right? The general rule, however, is not disputed; but its application to the present case is denied, and the ground of that denial is, first, because Mr. *Rennell* was a spiritual corporation, and had this right of presentation annexed to a spiritual dignity, and clothed with a spiritual trust. My answer is, that though Mr. *Rennell* was a spiritual person, the dignity to which the right of presentation was attached, was not in its creation spiritual; and, that if it were, it was not clothed with any spiritual trust. Mr.

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R.'s dignity was a prebend only; and at common law a *layman* might be *prebendary*. *Bland v. Maddox.* (a) A prebendary has no cure of souls; he is called "prebendary," because his duty is *prebere auxilium episcopo*. He has his possessions annexed to his prebend to enable him to provide for himself and his family. It is only by the restraining statutes that he is prevented from alienating, with consent of patron and ordinary, all his possessions to the disherison of his successor; and he has of himself the full power of alienating them so as to bind himself; and it is not of necessity that he should have any possessions. 3 *Rep.* 75 *b.* *Dy.* 61 *b.* *pl.* 30. 50 *Ed.* 3. 26. 2 *Roll. Ab.* 341. It is only under 13 & 14 *Car.* 2. *c.* 4. *s.* 14. that he need be in holy orders.

But admitting that a prebend were a spiritual dignity, does it follow that church preferment in the gift of the prebendary in right of his prebend, is clothed with a spiritual trust? Is the spiritual preferment to which a bishop is entitled in right of his see, clothed with any spiritual trust? May he not grant away the next avoidance of any church, though the advowson be in gross, which he as bishop is entitled to fill, or as many avoidances as shall happen within his own time? and will not such grant bind himself? *Watson* says he may make the grant, and it will bind him. *Watson*, *c.* 10. *p.* 135, 136. *c.* 45. *p.* 873. If an advowson be appendant to a manor usually let, and a lease be made thereof, it will, at all events, bind the bishop who made it, and his lessee shall present. *Gibson*, 793. says, "Advowsons may be granted by deed or will, either for the inheritance, or one or more turns. But this extends not to ecclesiastical persons seised in right of their churches, nor to colleges or hospitals seised in right of their charter; for they are so far restrained by the statutes of *Eliz.*, that their grants,

(a) *Cro. Eliz.* 79.

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though confirmed, will not bind their successors. But they will bind the grantors for their own times." And if it be made conformably to the statutes, it will bind the successors. *Watson*, c. 10. p. 137., c. 45. p. 875, 876. In *Smallwood v. Bishop of Coventry* (a), the bishop had made a grant of the next avoidance of an arch-deaconry, (a spiritual dignity,) and he afterwards disturbed the grantee; the grantee died, and his executor brought a *quare impedit*, and the bishop's grant was held good, and the executors had judgment. In *Foord's* case (b), a prebendary of this very church made a lease of a rectory, parcel of his prebend, for seventy years. The dean and chapter confirmed it for fifty-one years. The successor disputed it within fifty-one years. *Watson* says, it would have been good for his own time without confirmation; *Watson*, 481.; and all the Court (except *Griffin*), held it good for fifty-one years. In *London v. Chapter of Southwell* (c), where plaintiff claimed in *quare impedit* as lessee of a prebend to which the advowson belonged, the question was, whether the lease had words sufficient to carry the prebend or not; and it was only because the words were not sufficient, that the decision was against the Plaintiff. Presentations to a vicarage belong of common right to the parson; but by consent of patron and ordinary he may grant it to another: *F. N. B.* 34. a. The case of *Sharrock v. Boucher* (d) seems to shew the distinction between what is clothed with a spiritual trust, and what is not; and what may be alienated, and what cannot. A prebendary leased his prebend for three lives, and whether that passed the right to fill up the office of commissary within the prebend was the question; the judges agreed it did not,

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(a) *Cro. Eliz.* 207.(c) *Hob.* 303.(b) 1 *Anderson*, 47. 5 *Rep.*(d) *T. Raym.* 88. 1 *Lev.* 125.81. *Dyer*, 338 b. *Cro. Eliz.*

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if the right belonged to his spiritual functions; but on that point they were divided.

The only remaining point is founded upon the rule which prevails in the case of the king and a bishop, and a supposed analogy between that case and this. When a bishop dies, leaving a church in his gift vacant, the king is to present, not the executors of the bishop. And if this rule be founded upon the spiritual character of the act of presenting, it is an authority in this case; if it be founded on the relation between the bishop and the king, and is referred to the king's prerogative, it is not. And I am of opinion it is referable to the relation between the bishop and the king, and to the king's prerogative. The king is the sovereign patron of every bishopric: 17 *Ed.* 3. 40. And though he gives the chapter leave to elect, the patronage is in him: 17 *Ed.* 3. 40. And upon the death of a bishop, the see comes to the king as the bishop left it; and if the deanery or a stall be left vacant, the king shall fill it up: 17 *Ed.* 3. 40. A prebendary of *Abergavilly*, the bishop (of *St. David's*), died. The temporalities were seized into the king's hands; a new bishop was appointed, and filled up the stall. The king brought *quare impedit*, and it was adjudged that he had the right; and a writ was awarded to the bishop: *Rex v. Bishop of St. David's*, 50 *Ed.* 3. 26. The temporalities came to the king as founder by prescription: *Mall.* 65. n. to pl. 1. And this is so high a prerogative, and so far united to and inseparable from the crown, that a subject cannot claim it by grant or prescription: *Mall.* 65. n. to pl. 6. And if the king die, *sede vacante*, the succeeding king shall have the temporalities, not the king's executor: *Mall.* 65. n. to pl. 4. *Bro. Chattels*, 2. 2 *Roll. Abr.* 211. And if the king die, leaving a church void, the succeeding king shall present: *Semb. Mall.* 65. pl. 4. and *Mall.* 42. pl. 16. *Bro. Chattels*, 2. 2 *Roll. Abr.*

Abr. 211. And this, though the church became void in the bishop's life, and though the new bishop has sued out living out of the king's hands before the king presents: *Mall.* 65. *pl.* 5. *Watson*, 73. *F. N. B.* 33. *n.* 2 *Roll.*

Abr. 343. *pl.* 5. In the case of a bishopric, therefore, if the bishop dies, whatever spiritual preferment in the gift of the bishop was vacant at the bishop's death, and whatever shall become vacant till the see is filled up, devolves upon the crown, and is inseparable from the crown, so that the crown cannot grant it away; and in case of the demise of the crown, it will pass, not to the executors of the deceased king, but will accompany the crown, and go to the succeeding king. Upon this, two observations occur, one, that in the case of the crown, and in the case of the crown only, can a sole corporator, which the king is, take a chattel by succession; so that, what is the rule in the king's case where the right to present may, by reason of the prerogative, pass from bishop to king, from king to king, will not apply to the case of a prebendary where there is no such prerogative, to pass the right from prebendary to prebendary: 16 *Vin. Q.* 14. 17 *Vin. Y.* The other, that what is the case of the crown with reference to a bishop who holds *per baroniam*, is the case with every other tenant *in capite*, where the tenancy, by reason of infancy in the heir, becomes as it were suspended, and the tenancy returns in wardship to the king. *Co. Lit.* 388. *a.* is express upon this point, and he puts the two cases together, that of the king's tenant *in capite*, and that of a bishop's. If the king's tenant by knight's service *in capite* be seised of a manor to which an advowson is appendant, and the church become void and the tenant die, (leaving his heir in ward,) the king shall present, not the executor. And if a church, in the gift of a bishop, become void, and the bishop die, the king shall present, not the executor: *Co. Lit.* 388. *a.*

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The right, therefore, of the king, in the case of a bishopric, appears to me to be referable, not to the spiritual character of the person from whom the right comes, but to the king's prerogative, because it obtains equally in the case of every tenant *in capite*, whether he be a spiritual person or not. Upon the whole, therefore, I am of opinion that the general rule is, that if a church becomes vacant, and the patron die, the right to present devolves upon his executor. That this is the rule also, where a prebendary in right of his church is patron, because, until the statute of *Car. 2.*, (13 & 14 *Car. 2. c. 4. s. 14.*,) it was not necessary a prebendary should be a spiritual person; and, because, in the case of spiritual persons, their right to present to churches is temporal, not spiritual, inasmuch as they may grant it away before a vacancy occurs, as they may their other temporal possessions; and that the excepted case of a bishop is not applicable to other spiritual persons seised of advowsons in right of their dignities or churches, because the case of a bishop is referred to the prerogative of the crown, which enables the crown to take a chattel in succession, and to the relation in which the crown stands to a bishop, the bishop being tenant *in capite* to the crown, not to the spiritual character of the bishop, nor to any spiritual nature in the right. My answer, therefore, to the question proposed by your Lordships is, that in the case that question propounds, the right of presenting belongs to the executor of the prebendary.

TINDAL C. J. My Lords, upon the best consideration I can bring to this case, I have come to the conclusion, that the right of presentation belongs to the personal representative of the late prebendary; but at the same time I am ready to admit it is after considerable doubt upon the question which has been submitted to us by your Lordships.

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If I felt myself at liberty to look at the particular foundation of this prebendal stall, or to consider, upon general principles, what might be most fitting and expedient in the case of patronage belonging to an ecclesiastical corporation, such as is a prebendary, I could bring myself without difficulty to the conclusion that the right to fill up the term which was vacant at the time of the late prebendary's death, ought to devolve upon his successor, and not to go to his personal representative.

But neither upon the abstract question proposed by your Lordships, nor upon the facts stated on the record in this case, can I take judicial notice, either of the circumstances attending the original foundation of this prebend, the endowment thereof with this particular advowson, or the form of presentation which has been used and adopted on occasion of former vacancies.

And as to any considerations derived from general expedience, I feel myself restrained from entering into them, because there appears to me to be an analogy of sufficient strength and certainty, to bring the present case within the reach of acknowledged principles of law, and the authority of various decided cases.

It is upon the ground of this analogy which exists between the present case and those principles and authorities, that I feel myself bound to concur in the opinion which has been expressed by the majority of his Majesty's Judges: thinking it a safer course upon this occasion, as I find has been the opinion of other Judges from the earliest periods of the law to adhere to any rule which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just.

I assume it to be settled law, admitting of no doubt or dispute, and not requiring to be supported by reference to any authorities, that where an advowson
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presentative is vested in any person in his natural capacity, either in fee or for life, and the church becomes void, and the owner dies after such avoidance without making any appointment, the right to appoint to the vacant turn belongs to the executor, and not to the heir, or to the next owner of the advowson. Indeed, so clearly is this principle recognized, that all the books concur in calling this vacant turn a chattel vested in the testator. (*Fitz. N. B.* 33 P. 34 N. 4 *Leon.* 109.)

In the case in *Fitz. N. B.* 33 P. it is stated, that if a man be seised of an advowson in fee, in gross, or in fee appendant unto a manor, and the advowson becomes void, and he dieth, his executor shall present, and not his heir, because it was *a chattel vested and severed from the manor*. If the chattel is severed from the manor in that case, why may it not be considered as severed from the prebend in this? And if once severed, it is difficult to assign any legal principle upon which it can be remitted. Unless, therefore, some solid ground can be laid down, upon which a distinction can be made between a prebendary seised of the advowson in right of his prebend, and a person seised in his own natural right of a manor to which an advowson is appendant, there can be no doubt but the case falls within the general rule, that the right to present is a chattel interest, and would go to his personal representative. It will be advisable, therefore, to refer to some of the cases and principles which carry the analogy more closely to the particular question now under discussion.

In *Fitz. N. B.* 34 N. is found this case; if a vicarage happen void, and *before* the *parson* present he is made a bishop, &c. yet he shall present unto this vicarage, because it is a chattel vested in him. The authority referred to is 24 *Edw.* 3. 26.; but the case, which is not to be found in the Year Book, will be found inserted nearly in the same words in *Fitz. Abr. Quare Imp.* 22. In that

that case, as in the present, the patron was seised in *jure ecclesiæ*: and notwithstanding he ceased to be rector, he still carried with him in his natural capacity this chattel interest, the right of appointing to the vacancy. In that case it was held that the chattel interest which had once vested in him, did not afterwards reunite with the corporation sole, the parson. That case appears to me to be a direct authority upon the present question, to this extent; that if the living had become void, and the prebendary had vacated the prebend, the right of appointment would have belonged to him, not to his successor. If so, and he still retained the right to appoint, notwithstanding his loss of the prebend, on what principle shall his death be held to reunite the presentation with the prebend from which it has once been severed? The case in 2 *Rol. Abr.* 346. F. pl. 4. shews the law, where the avoidance of a vicarage happens after the vacancy of the rectory, and before the new rector is appointed. "If the parson has the right to present to the vicarage, yet if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage shall present." So that although the rector be in the nature of an ecclesiastical corporation sole, and although the rector be seised of this right of presentation *jure ecclesiæ*, yet it shall not devolve to the successor; but if it happen *before* the vacancy, the former rector shall still appoint, if *during* the vacancy, the patron. Both which cases are strong to shew, there is no indissoluble union between the right of presentation and the prebend itself.

To which may be added the case stated in *Fitz. N. B.* 33 P. "that if a bishop die seised of a manor to which an advowson is appendant, and the advowson happen void before his death, the king shall present unto the same by reason of the temporalities, and not the bishop's executor." The reason is that the king takes the temporalities

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poralities by reason of his prerogative, and the term being once vested in him, cannot be got out of him but by matter of record. Now although the express point adjudged by that case does not apply here, because there is no prerogative in this case, yet it furnishes an observation which appears not unimportant. *Fitzherbert* puts this case in opposition with that which had immediately preceded it, namely, the case in which he has stated "the executor shall present and not the heir, because it was a chattel vested and severed from the manor, &c." He then puts the case of the bishop; and the inference to be drawn is, that but for the prerogative the executor would have presented: otherwise he would not have said, the king shall present, *and not the bishop's executor*; the observation would have been, the king shall present, and not the successor.

If this is a just inference, the authority of the case last referred to would go the length of deciding the present; if the executor of the bishop would be entitled to present to the turn which fell vacant in the bishop's life, and which belonged to the bishop, *jure ecclesiæ*, had not the prerogative stepped in and prevented him; it would follow in the present case, where no such prerogative exists, the executor has the right to present to the vacant benefice.

The power of the prebendary to grant the next turn to a stranger before it becomes vacant, affords a further argument against the notion that the right of presentation is to be considered as inseparably annexed to the prebendary himself for the time being, on the ground that it is an ecclesiastical trust to be exercised by him only to whom the foundation has given it. Such grants are of very frequent recurrence in the old books of entries containing pleadings in *quare impedit*; and it is impossible to conceive they should be found there unless the practice was common, or that they could have been

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put upon the record if such grants were against law; inasmuch as the Plaintiff deriving title under them would only be shewing the insufficiency of his right to sue. Again, the universal practice of grants made to the archbishops by bishops of their province, of those rights of presentation well known by the name of options, furnish at least the inference, that though the right to present comes to an ecclesiastical person, by virtue of his ecclesiastical character, still there is no rule of law that it must be exercised in person, but that the law allows it to be transferred to another. It may indeed be said, that this is not a transfer to a layman or a stranger, but merely to an ecclesiastic of the same or higher dignity; and therefore this ecclesiastical trust may be presumed not to be violated by such transfer of its execution. Admit it to be so, still how can we reconcile to that principle the right which the archbishop has to devise these options to any one he chooses to select? And that such power exists, appears from the case of *Potter v. Chapman* (a), where the only question before Lord *Hardwicke* is made upon the propriety of the particular appointment by the trustees under the archbishop's will; but none whatever upon the right of the testator to bequeath them to his trustees. If then the bishop may sever and disannex from his bishoprick a right of presentation to which he becomes entitled *jure episcopatus*, and no otherwise; still further, if the archbishop to whom the grant hath been made may bequeath it to a stranger by his will; or what is an identical proposition, if it would devolve upon his personal representative in case he had made no such bequest; it will surely be dangerous to build an opinion that the presentation now in dispute must belong to the successor, on the ground that it is of an ecclesiastical

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character, in the nature of an ecclesiastical trust, and by reason thereof must be exercised by the person who fills the prebendal stall, and by him only. So that the doctrine laid down in *Doctor and Student* would appear to be correct, where no distinction whatever is introduced between presentations made by laymen or presentations made by corporations; between advowsons appendant to manors, or advowsons appendant to offices of the church; but it is laid down generally thus, (see *Dial. 2. cap. 26.*) — “It is holden in the law of the realm, that the right of presentment to a church is a temporal inheritance, and shall descend by course of inheritance from heir to heir, as lands and tenements shall, and shall be taken as assets, as lands and tenements be.” And again, “the goods of spiritual men be temporal, in what manner soever they come to them, and must be ordered after the temporal law, as the goods of temporal men must be.” Now if the vacant turn in a benefice be a chattel interest, as the authorities above referred to seem abundantly to shew, if it passes by grant, is devisable by will, or in case of no bequest, goes to the personal representative; then indeed is the passage above cited a strong proof of the opinion of learned men at the early period when that book was written, that no just distinction can be taken between a right of presentation vesting in a spiritual man, by whatever means it may come, and a similar right in a layman. It affords a further argument that the right to present to the vacant living, cannot devolve upon the successor, and go along with the prebend, that a prebendary is a corporation sole, and that by law a corporation sole is incapable, except by custom, of taking in succession chattels real or personal, either in possession or action. (*Co. Litt. 9. a. 46. b. Hob. 64.*) If this be the law, how can this vacant turn, once severed from the prebend, become re-united, and descend with the corporation sole?

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That such would be the case as to some of the profits of the prebendal stall, where they fall due in the lifetime of the predecessor, appears clear. Rent which accrued due in his lifetime would go to his executor. For the statute 28 *Hen. 8. c. 11.* gives to the successor the rent *only* which accrues *during the vacancy*; leaving the right to the rent due in the predecessor's lifetime where it then stood, that is, as a chose in action or a personal chattel, which would go to the personal representative. But it is very difficult to draw a sound distinction between rent which has fallen due, and a right of presentation which has attached during the life of the former prebendary, except upon the ground that the one is a right of a temporal nature, the other of a spiritual; and whether that be a sound distinction or not, I must lean upon the names and authorities which I have before given.

The case of the donative, cited from 2 *Wils. Rep.* does indeed, furnish some inference for a different opinion from that which I have formed; but I must confess myself unable to see the ground upon which that judgment proceeded in so short and unsatisfactory a report, with such degree of clearness as to place it in competition against the other principles to which I have referred, and which lead my mind to a different conclusion.

I have therefore felt myself bound by the analogy to be drawn from cases decided as to lay advowsons, to adopt the opinion, that the right of presentation in this case belongs to the administratrix of the late prebendary. I must admit, at the same time, that it might be more fitting and expedient that it should devolve upon the successor; but I am not asked by your lordships what is most expedient, but what the law at present is upon the question submitted to us.

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B. devised to his only son *E.* for life, remainder to his issue in tail; remainder to *B.*'s two daughters in tail; remainder to *B.*'s right heirs: the two daughters suffered recoveries to the use of *E.*, and by an act of parliament reciting the will, the recoveries, and that *E.* had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase-money in the purchase of other estates to be settled to such of the uses in the will of *B.* as should be existing undetermined or

BY order of the Lord Chancellor the following case was submitted for the opinion of the Court:—

Elisha Biscoe, by will dated 7th of November 1772, gave all his estates not settled in jointure, nor therein specifically given, unto his son *Elisha* for life, without impeachment of waste. Remainder to *Joshua Smith* and *Thomas James*, to preserve contingent remainders. Remainder to the first son of the said *Elisha* in tail male. Remainder to the second, third, fourth, and other sons of his said son successively in tail male. Remainder to the daughter of his said son; and, if there should be more than one, to all the daughters of his said son. And in case of his son's death without issue, the testator gave and devised the said estates unto the first and other sons he, the testator, might thereafter have, in tail male. Remainder to his daughters as tenants in common, and the heirs of their respective bodies in tail, with divers remainders over; and ultimately to testator's own right heirs. The estates were charged with sums of 2000*l.* and 3000*l.* in favour of testator's daughters.

The testator died in 1776, leaving one son, the said *Elisha Biscoe*, and two daughters, *Ann* and *Catherine Frances*. *Ann*, in 1789, intermarried with *T. H. Earle*, and before 1794 *Catherine Frances* intermarried with *E. Rolfe*.

The daughters and their husbands, by indentures of capable of taking effect at the time of the sale: the trustees sold, and with the purchase-money purchased an estate which, by a conveyance reciting the will of *B.* and the act, was conveyed to them to such of the uses in the will of *B.* as were then existing undetermined and capable of taking effect: Held, that under the conveyance the trustees took a fee.

lease

lease and release bearing date respectively the 4th and 5th of *February* 1789, and the 11th and 12th of *June* 1793, conveyed their interest in the property to trustees, and their heirs and assigns for ever, to the intent that three or more common recoveries should be suffered thereof, which said recoveries it was declared should enure to the use of the said *Elisha Biscoe*, his heirs and assigns for ever. And recoveries of the premises were accordingly suffered in *Hilary* term 1789, and *Trinity* term 1793.

By act of parliament, 34 G. 3., intituled “ An act for empowering trustees to convey to Sir *Joseph Banks*, Bart. a part of the settled estates of *Elisha Biscoe*, Esq. pursuant to his contract for the purchase thereof, and to sell or exchange other parts of the said settled estates, and lay out the money arising from the sales in the purchase of other lands to be settled, as well as those taken in exchange, to the uses of the estates that shall be so sold or exchanged ;” after reciting the will of the said *Elisha Biscoe*, and that said testator died on the 28th of *January* 1776, without having revoked or altered said will ; the said indentures of lease and release of 4th and 5th of *February* 1789, and recovery suffered thereupon ; and also the said indentures of 11th and 12th of *June* 1793, and recovery suffered thereupon ; that *Elisha Biscoe*, the son, was unmarried, and had not any issue ; that the several limitations created by said will, and expectant on failure of issue of said *Ann Earle* and *Catherine Frances Rolfe* were barred by said recoveries ; and that the said *Elisha Biscoe*, the son, was seised of the remainder or reversion thereof in fee-simple, expectant on failure of his own issue ; and also that the estates lay at inconvenient and great distances, or in separate parcels detached from each other, and intermixed with the lands of other persons, — it was enacted (amongst other things), “ That it shall be lawful for *Edmund Calarny* and

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James Wortham, trustees, to sell or exchange the estates therein mentioned" (and which were the estates devised by the residuary clause of the elder *Biscoe's* will), "and lay out the purchase-money in the purchase of other estates to be settled to *such of the uses*, upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisoes, declarations, and agreements in and by the said in part recited will of the said *Elisha Biscoe* deceased, particularly or by reference limited, declared, contained, or mentioned of and concerning the messuages, lands, and hereditaments thereby respectively devised or intended so to be, and by the said act authorised to be sold or exchanged as thereinbefore mentioned, *as then were, or at the time of making such sale*, exchange or exchanges, assurance or assurances, as in the said act mentioned *should be existing undetermined or capable of taking effect*, or as near thereto as the nature and qualities of the estates so to be purchased or had in exchange would then admit of: and it was thereby further enacted, that until such sales, conveyances, exchanges, and assurances should be respectively made and executed, the said hereditaments, or so much of them as should not be sold or exchanged should be held and enjoyed, and the rents, issues, and profits thereof received and taken by and or the benefit of such person or persons who would have been entitled to, and ought to have received the same, in case the said act had not passed. And the last clause of the said act was in the following words: "Saving always to the King's most excellent Majesty, his heirs and successors, and the said *Timothy Hare Earle* and *Ann* his wife, and their children, and the said *Edmund Rolfe*, and *Catherine Frances* his wife, and their children, in respect of the aforesaid sums of 2000*l.* and 3000*l.* only, and all and every person or persons, bodies politic or corporate, his, her, and their

their respective heirs, successor, and executors and administrators, other than and except the said *Elisha Biscoe*, the son, and his heirs, and the heirs of the body of the said *Elisha Biscoe*, the son, all such estates, rights, titles, claims, and demands whatsoever, of, in, to, or out of the messuages, lands, and hereditaments hereby authorized to be sold or exchanged as aforesaid, or any part or parts thereof as they or any of them had before the passing of this act, or could or might have had or enjoyed in case the same had not been made."

In pursuance of the act, the surviving trustee, *James Wortham*, sold the said devised estates, and with the purchase-money bought others. The following was an abstract of the conveyance taken by *Wortham* of the estates so purchased, which were estates now contracted to be sold to *Mackinnon*.

By indentures of lease and release, bearing date 26th and 27th of *March* 1817, the release made between *James Payne*, of the first part, divers other persons of the second, third, fourth, fifth, sixth, seventh, and eighth parts, the said *James Wortham*, of the ninth part, and *Elisha Biscoe*, of the tenth part, — [after several recitals, deducing the title of the vendors and the contract for sale of certain estates thereafter expressed to be thereby released to the said *James Wortham*; a recital of the before mentioned will of *Elisha Biscoe* the elder, of the 7th of *November* 1772, and that the said testator departed this life on or about the 28th of *January* 1776, without having revoked or altered his said will, leaving *Frances* his widow, and said *Elisha Biscoe* (party thereto) his only son, and *Ann*, who had intermarried with *Timothy Hare Earle*, and *Catherine Frances*, who had intermarried with *Edmund Rolfe*, the younger, his only daughters; a recital of the before mentioned indentures of lease and release of the 4th and 5th of *February* 1789, and the 11th and 12th of *June* 1793, and the three re-

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coveries suffered in pursuance thereof; of the before-mentioned act of parliament of the 34 G. 3., and also that several of the hereditaments comprised in the said recited act of parliament, and thereby directed to be sold by the said *Edmund Calamy* and *James Wortham* as aforesaid, had been accordingly sold by them; and that the several hereditaments so contracted to be sold to said *James Wortham* as aforesaid, were so contracted to be sold to him as surviving trustee acting by virtue of or under the said act of parliament, and at the request and with the consent and approbation of the said *E. Biscoe*,]—the several parties conveyed their respective interests in an estate called *Titcombe*, in the county of *Bucks*, which was the same estate now contracted to be sold to the Defendant *Mackinnon*, to the said *James Wortham*, as such surviving trustee, under the said act of parliament: to hold the same to the said *James Wortham* and his heirs for ever, nevertheless upon the uses, trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations thereafter limited and expressed concerning the same. And it was by the then abstracted indenture agreed and declared by and between the said parties thereto, that *James Wortham* and his heirs should thenceforth stand and be seised of the said estate and premises, *to such of the uses*, upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisoes, and declarations *in and by the said in part recited will of Elisha Biscoe, deceased*, partly or by reference limited, declared, contained, or mentioned of and concerning the messuages, lands, and hereditaments thereby devised, and by the said in part recited act of parliament authorized to be sold or exchanged as aforesaid, *as were then existing undetermined and capable of taking effect.*"

Elisha Biscoe, the son, is since dead, having by his will,

will, bearing date the 26th of *May* 1824, given and devised all and singular his freehold messuages, farms, lands, tenements, estates, hereditaments, and premises whatsoever, and including his estate in the county of *Bucks*, callled *Titcombe*, unto the said *James Wortham* and *Thomas Bramall*, upon trusts therein mentioned and authorized in an event which has happened, viz.: a deficiency of the personal estate to answer the legacies, absolutely to sell and dispose of any part or parts of his said real estate.

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On the 17th of *October* 1830, the Defendant *Mackinnon* entered into an agreement with *Wortham* and *Bramall* for the purchase of the *Titcombe* estate.

The question for the opinion of the Court was, what estate had the said *James Wortham* and *Thomas Bramall*, in, and what power had they over, the lands, hereditaments, and premises conveyed and assured as aforesaid, by the said indentures of the 26th and 27th of *March* 1817?

Coleridge Serjt. for the Plaintiffs. The question is, what uses were existing undetermined at the time of the act. It will be contended, that these words apply only to uses determined by natural events or efflux of time; and not to those determined by the act of the parties. But, independent of the plain meaning of the words, what was the intention of the act? It must be construed like a deed, and the recital may be looked at to shew the intention of the legislature. That shews that the uses to the daughters were considered as determined. The saving clause refers to the 2000*l.* and 3000*l.* alone: and the act was not passed for the benefit of the daughters, but for the benefit of *Elisha Biscoe*. The daughters have no interest in the purchase-money under the act, and if the act had never passed, they could have had no claim. But it will be said, that we must look at the words of

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the conveyance of the 26th and 27th of *March* alone, and not at the act of parliament; and *Cholmondeley v. Clinton* (a) will be relied on; a case which, as to this point, may be considered still undetermined, and which only decided that the Court were bound to give effect to words in a deed having a distinct legal meaning, and that the meaning must be applied to the time at which the words are used. Here the question is, what meaning is to be put on words which admit of more than one meaning. To construe them, we must look to the state of the interests at the time.

Taddy Serjt. contra. This is a question merely on the construction of a deed, not of a will. And it is a clear principle, that the Court must give effect to the operative words of a conveyance, and that they cannot control them by a dubious expression contained in recitals: *Cholmondeley v. Clinton*. The operative words of the deed, are, that the property is conveyed “upon and for such of the trusts, intents, and purposes, and with, under, and subject to such of the powers, provisoes, and declarations, in and by the said in part recited will of *Elisha Biscoe*, deceased, partly, or by reference, limited, declared, contained, or mentioned, of and concerning the messuages, lands, and hereditaments thereby devised, and by the said in part recited act of parliament authorized to be sold or exchanged as aforesaid, as were then existing undetermined and capable of taking effect.” The limitations of the will of *E. Biscoe* were to his son for life; remainder to the issue of the son, successively in tail; remainder to the testator’s after-born sons in tail; remainder to testator’s daughters in tail; remainder to testator’s own right heirs. If, as the act recites, the remainders,

(a) 2 B. & A. 625. 2 Jac. & W. 84.

after

after the estates to the daughters, are barred by the recovery, the remainder to the heirs of the testator are also barred. And though, where words are ambiguous, they may be explained by the context; here they are unambiguous. Suppose the intention had been to revive the uses of the will, could words more explicit have been used? The effect of a common recovery is to raise a new estate; but to many purposes the old uses remain. In *Abbott v. Burton (a)*, where *H.*, being seised of lands *ex parte materna*, by a deed to declare the uses of a recovery limited several estates, with remainder to the use of his right heirs, it was holden, that the heir *ex parte materna* should have it, being the ancient use. And that is the effect of this act of parliament. It states that the limitations are barred; but the uses are not determined. Perhaps this was a mistake; but that will not alter the effect of the words in the deed of the 26th and 27th of *March*. If the words are unambiguous, the parties have not used language to carry their intention into effect. The uses to the daughters are not determined, though the limitations to them have been barred.

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Coleridge in reply. As to the construction of deeds, the primary rule is, to look at the intention of the parties; though with more strictness as to technical words than in the case of a will. Here, the uses to the daughters mean the estates to the daughters. The act recites that these estates are barred; if so, they are non-existing, determined, incapable of taking effect; and there is no authority for saying that uses and estates destroyed are still existing. And the recovery destroyed only the estates tail, upon the common principle of voucher and recompence; the ultimate remainder in fee is untouched,

(a) 2 *Salk.* 590.

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as appears by the case cited from *Salkeld*. The old estate reverted to *E. Biscoe*.

The following certificate was afterwards sent:—

We have heard this case argued by counsel, and have considered it; and we are of opinion that the Plaintiffs, *James Wortham* and *Thomas Bramall*, took an estate in fee simple in the lands, hereditaments, and premises conveyed and assured by the indentures of the 26th and 27th of *March* 1817.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.

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ABATEMENT.

See PLEADING, 3. 6.

ACTION ON THE CASE.

Plaintiffs being about to furnish Defendant's son with goods on credit, enquired of the Defendant, by letter, whether his son had, as he asserted, 300*l.* of his own property: Defendant answered that he had; the fact being that Defendant had lent his son 300*l.* on his promissory note, payable with interest, on demand, and had received interest on the note.

The son having afterwards become insolvent: Held, that this was a misrepresentation, for which the Defendant was liable in damages to the Plaintiffs, and a jury having found for Defendant, the Court granted a new trial. *Corbett and Another v. Brown.*

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ADULTERY.

1. Adultery of the wife after separation, no plea to a covenant to pay a trustee a separate maintenance for the wife.

2. A declaration alleging, that by indenture *purporting* to be made between Plaintiff and Defendant, it was *witnessed* that Defendant covenanted, Held, after plea, sufficiently certain. *Baynon v. Batley.* Page 256

ADVOWSON.

See PRESENTATION.

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See PRACTICE, 13.

AGENT.

See AWARD, 2. EVIDENCE, 12.

AGREEMENT.

1. Defendants engaged Plaintiff to write a treatise for a periodical pub-

publication. Plaintiff commenced the treatise, but before he had completed it, the Defendants abandoned the periodical publication: Held, that Plaintiff might sue for compensation, without tendering or delivering the treatise. *Planchè v. Colburn and Another.*

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2. By agreement, *T.*, an agent, was to have a commission on all sales effected, or orders executed by him; the principal to be responsible for bad debts, and the agent to draw his commission monthly. By the custom of the trade, commission was not allowed on sales which produced bad debts: Held, notwithstanding, that under the terms of this agreement *T.* was entitled to commission on bad debts. *Bower v. Jones.* 65

AMENDMENT.

See RECOVERY, 1.

1. In an action against Defendant for not obeying a *subpœna*, the declaration stated that the Plaintiff caused to be left with Defendant a *copy of the writ of subpœna*: Held, that a Judge at *Nisi Prius* had authority under 9 G. 4. c. 15. to allow this allegation to be amended as follows:—"a copy of so much of the said writ of subpœna as related to the said Defendant."
2. In such an action as the above, it is *prima facie* sufficient to allege that the Defendant was a material witness, and that his ab-

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sence caused the Plaintiff to be nonsuited, without averring that Plaintiff had originally a good cause of action. At all events, such allegation is sufficient after verdict. *Masterman and Others v. Judson.* Page 224

ANNUITY.

An annuity deed, of which there was no counterpart, was placed in the hands of *R.*, as agent for grantor and grantee. *R.* received the annuity for grantee. The grantor redeemed the annuity by paying the amount of the purchase money to *R.*, who, without express authority from the grantee, delivered the deed to grantor to be cancelled. *R.* having absconded without paying the grantee, and the grantee having sued grantor for arrears, Held, that he was entitled to call for an inspection of the deed. *Devenoge v. Bouverie.* 1

APPEARANCE.

See PRACTICE, 12.

ARBITRATION.

1. A submission to refer a cause, and the subject-matter thereof, and the *issue therein*, to the award of a barrister, does not authorize him to order a verdict to be entered up. *Hutchinson v. Blackwell.* 331
2. Held, that a reference to arbitrators to balance accounts and settle all matters in dispute respecting the

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the leaving and occupying of two corn-mills and dwelling-house, did not authorize them to decide on the costs of an action for fixtures, at least up to the time of paying money into court, when the submission was entered into. *Stratton v. Green.* Page 437

ARREST.

See PRIVILEGE. PRACTICE, 9.

ASSIGNEES.

See PLEADING, 1.

ATTORNEY.

See COSTS, 4.

AWARD.

1. Upon reference to a surveyor of a cause and all matters in difference, an award that Defendant had overpaid Plaintiff 34*l.*, Held, not sufficient to entitle the Plaintiff to enforce the award by attachment. *Thornton v. Hornby.*

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2. Plaintiff remitted to Defendant the price of some hay he had sold for Defendant, before the money had been paid by the purchaser, and then sent Defendant's servant with the hay to the purchaser. The servant having been cheated of the hay before he arrived at the purchaser's, Held, the Defendant was liable to refund the money remitted. *Gingell v. Glascock.* Page 86

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BAIL.

See PRACTICE, 14.

BAILIFF OF LIBERTY.

See PRACTICE, 1.

BANKRUPT.

See PARTNER.

1. Plaintiff having proved under a commission of bankrupt in 1816, Held, estopped to sue for the same debt after the passing of 6 G. 4. c. 16., though that statute repeals 49 G. 3. c. 121., which makes proof of a debt an election not to sue. *Adames v. Bridger.* Page 314
2. Defendants took goods under a second commission of bankrupt, while a former commission was subsisting: Held, they could not retain them, even against a colourable title, the second commission being void. *Nelson v. Cherrill and Another.* 316
3. A trader, having been denied to a creditor who called for money, was, after a little time, seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward, said he was not at home:

Held, that a jury were properly directed to consider whether the trader "had kept his house: had wilfully secluded himself; that is, had withdrawn himself from a part of the house where he was likely

to

to meet a creditor, to a more retired part." *Key, Assignee of Sherwin, a Bankrupt, v. Shaw.*

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4. Defendant, a leaseholder, underlet to *N.*, and put him in possession under an agreement to grant a lease when *N.* should have paid 1200*l.*, which he was to do by instalments in three years, in the mean time paying rent at certain days to Defendant, subject to distress for nonpayment. Defendant received rent from *N.*, but omitted to pay the superior landlord, who distrained on *N.* for arrears due from Defendant. *N.* having become bankrupt, Held, that the damage incurred by this distress was a cause of action on which his assignees might sue. *Hancock and Another, Assignees of Nicholles, a Bankrupt, v. Cafyn.*

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5. By marriage-settlement, *S.* covenanted to cause 4000*l.* to be paid to his wife's trustees within twelve months after his own decease, in trust to pay her the interest for her life in case she survived him, and afterwards the principal to their children; but if they had no children, to the survivor of them, *S.* and his wife, his or her executors or administrators:

Held, that this was a debt on a contingency, proveable under a commission of bankrupt against *S.* *Ex parte Tindal.*

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BATH COURT OF REQUESTS.

See PRACTICE, 6.

COPYHOLD FINE.

BILL OF EXCHANGE.

Where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the *drawer*, presentment to the acceptor at that place must be proved. *Gibb v. Mather and Others.* Page 214

BLOCKADE.

See CHARTER-PARTY.

CHARTER-PARTY.

It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the Defendant knew the fact at the time of entering into the charter-party. *Medeiros v. Hill.* 231

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What evidence sufficient to establish a custom for the payment of a full fine by remainder-man upon admission

admission to copyhold. *The Dean and Chapter of Ely v. Caldecot.*
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COSTS.

See PRACTICE, 16. ARBITRATION, 2.

1. When the costs of a former trial are to abide the event of a new trial, if the same party succeeds on the new trial, he has the costs of both trials; if a different party, he has only the costs of the new trial. *Sherlock v. Barned.* 21
2. Held that a judgment for Plaintiff in this Court might be set off against a judgment for Defendant in K. B., although Plaintiff was dead, and the judgment was assets in the hand of her administrator.
Held, that the judgment in K. B. for defendant was valid, although not entered up within two terms after death of defendant, verdict having been given during her life, and the delay occasioned by a motion touching an award. *Bridges, Widow, v. Smyth, Spinster.* 29
3. Plaintiff had judgment against E. for 2497l., and issued a writ of *fi. fa.*, to which the sheriff returned *nulla bona*, being indemnified by E.'s attorney, to whom, with other trustees, E.'s property had been conveyed in trust, to pay creditors. A verdict having been given for the sheriff, in an action against him by Plaintiff for a false return, Plaintiff was not allowed to set off the costs in that
- action against the debt due on the judgment for 2497l. *Hewett v. Pigott, Sheriff of Somerset. Same v. Lord Egmont.* Page 61
4. Where nearly a sixth was taken off an attorney's bill upon taxation, the Court refused to allow him the costs of taxation. *Elwood v. Pearse.* 83
5. Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness, from the time of *subpoena* to the time of trial, although the witness resided in *England*, was not examined, was a master in the royal navy, and did not shew the permission of the admiralty for him to engage in the merchant service. *Mount v. Larkins.* 195
6. Where in an action by the assignees of a bankrupt the bankruptcy is disputed, but the cause is referred to arbitration, the Judge before whom the cause is opened cannot certify under 6 G. 4. c. 16. s. 90. for the costs of proving the bankruptcy, although, upon referring, the Defendant agrees to admit the validity of the commission. *Barthrop and Others, Assignees of Yates, a Bankrupt v. Anderton.* 268
7. Interlocutory costs may be set off against final costs, where the payment of them at the time they are adjudged is not strictly a condition precedent to ulterior proceedings. *Doe v. Carter.* 330
8. A captain of a ship, witness in a cause, is allowed for his subsistence

ence according to his station, for the whole time during which he is detained to give evidence. *Temperley v. Scott.* Page 392

9. In an action of slander, although there be no justification, and no special damage alleged, the Plaintiff, if he recovers, is entitled to the expense of witnesses necessary to prove an inducement explanatory of the slander, and his professional reputation. *Andrews v. Thornton.* 431

COURT OF REQUESTS.

See PRACTICE, 6.

A balance of less than 5*l.* due on a bill of exchange for 17*l.* drawn payable in *London*, Held, a debt under 5*l.* arising within the jurisdiction of the *Halifax* Court, the parties residing at *Halifax*. *Walker v. Watson.* 414

DEED, CONSTRUCTION OF.

B. devised to his only son *E.* for life, remainder to his issue in tail, remainder to *B.*'s two daughters in tail, remainder to *B.*'s right heirs. The two daughters suffered recoveries to the use of *E.*; and by an act of parliament reciting the will, the recoveries, and that *E.* had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase-money in the purchase

DEVISE.

of other estates to be settled to such of the uses in the will of *B.* as should be existing undetermined or capable of taking effect at the time of the sale. The trustees sold, and with the purchase-money purchased an estate, which, by a conveyance reciting the act, was conveyed to them to such of the uses in the will of *B.* as were then existing undetermined and capable of taking effect. Held, that under this conveyance, the trustees took a fee. *Worham and Another v. Mackinnon.* Page 564

DEMISE.

See LANDLORD AND TENANT, 2.

DEVIATION.

See INSURANCE, 4.

DEVISE.

1. "As to the rest of my estate, my two houses in *S.* and *T.* I give to my wife for life; after her decease, that in *S.* to my daughter, the other between my two sons. The rest of my estate of what kind soever, one third to my wife, the rest equally among the three children." The testator had no real property but the two houses:

Held, that the daughter took a fee in the house in *S.* *Gall v. Esdaile.* 323

2. "My house in *A.* to such son of mine as shall first attain twenty-one

one years, when he shall attain such age, and his heirs; but in case I depart this life without leaving a son, or leaving such, none shall attain twenty-one, to my daughter *Jane*, if she shall attain twenty-one, and her heirs; but should I depart this life without leaving issue, to *L.* and his heirs."

Testator left one child, his daughter *Jane*, who died without issue under the age of twenty-one:

Held, that *L.* took nothing by the devise to him. *Doe dem. Rew and Others v. Lucraft.* Page 386

3. *J. H.* devised his copyhold premises called *P.*, &c. to the use of trustees, in trust for his wife, during her life or widowhood, or so long as she should reside upon the premises; remainder to the uses declared of his residue: he devised to the same trustees a freehold estate, charged with an annuity, in trust for his daughter for life; remainder to the use of her children in tail, and in default of issue upon the trusts declared as to his residue; he further devised to the same trustees certain freehold premises, and all the residue of his real estates, in trust for his son *H.* for life, charged with an annuity to testator's wife, remainder in tail male to the issue of his son; on failure of such issue, a further annuity being thereupon payable to testator's wife, to the use of his grandson *G.* for life, remainder to the sons of his grandson in tail male; and on failure of

such issue, to the use of the sons of his daughter in tail male, remainder to his right heirs. He bequeathed all his ready money to his wife absolutely; the dividends of all his money in the funds to his wife for life; and all the personal property in and upon the copyhold premises, in trust for his wife, during such time as she should be entitled to the copyhold premises, and on the determination of her estate therein, for his son, the devisee of the residuary real estate. The testator, by his first codicil, referring to his will, and reciting the death of his son, devised to the husband of his daughter, after her death, the freehold estate devised by his will to her; charged his residuary estate with a further annuity to his wife, over and above those already limited thereout for her benefit; bequeathed two further annuities to his daughter and to her husband, and revoked the bequest of his personal property in and about his copyhold premises, giving the same and the residue of his personal property absolutely to his wife, and in the event of her death before him, to his nephew. By a second codicil the testator appointed his wife sole executrix and residuary legatee of his personal property; and by a third codicil directed the proceeds of certain shares in the County Fire Office, to be enjoyed by his wife for life; after her death, by his daughter and her husband for life; and

and after their decease by his heir in possession. By a fourth codicil, revoking and making void several of the dispositions theretofore made by his will and codicils, of all his freehold, copyhold, and personal estate and effects of every kind and description, instead and in place of such devise, disposition, and bequest thereof, gave, devised, and bequeathed all and every his freehold, copyhold, and personal estate and effects of every kind and description whatsoever and wheresoever situated, to his daughter for life, remainder to his grandson and his heirs in strict entail, the rents to accumulate for his benefit till he was twenty-one; and on failure of issue, as by his will directed: he ratified and confirmed the several annuities and donations by his will and former codicils bequeathed; and gave and bequeathed to his wife a further annuity, with the like restrictions as the former, were payable; in all other respects confirming his will and codicils: Held, that the devise to testator's wife of the copyhold premises called *P.* was not revoked by the fourth codicil.

To revoke a clear devise, the intention to revoke must be as clear as the devise. *Doe dem. F. Hearle and A. M. Hearle, his Wife, v. Hicks.* Page 475

DISTRESS.

See RENT-CHARGE.

ELISORS.

See PRACTICE, 3.

ELECTION.

See RENT-CHARGE. BANKRUPT, 1.

ENTRY.

See RENT-CHARGE.

EVIDENCE.

See ANNUITY.

1. The judgment in the preceding ejectment is evidence in an action for mesne profits against a Defendant who came into possession under the Defendant in the ejectment. *Doe v. Whitcomb.* Page 46
2. Where a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the Judge. *Bradley v. Ricardo.* 57
3. Examination of witnesses by prothonotary. *Pirie v. Iron.* 143
4. When the bill of particulars is appended to the record pursuant to the rule of Court, it is not necessary to prove the delivery of it to the Defendant. *Macarthy v. Smith.* 145
5. Use and occupation. Defendant, who had occupied under a lease which expired at Lady-day 1829, paid a quarter's rent on Midsummer-day 1829, deducting something for repairs; he was not afterwards seen

seen on the premises, but the rent was paid at irregular intervals by *L.*, who was in occupation for the ensuing two years: Held, that it was correctly left to a jury to find whether the lessor had accepted *L.* as a tenant, and the jury having found for Defendant, the Court refused to set aside the verdict.

Woodcock v. Nuth. Page 170

6. Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession. *Doe v. Harvey.*

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7. Devise of all testator's freehold and real estates in the county of *L.* and city of *L.* Testator had no estates in the county of *L.*; a small estate in the city of *L.*, inadequate to meet the charges in the will; and estates in the county of *C.* not mentioned in the will: Held, that the devisee could not be allowed to shew by parol evidence, that the estates in the county of *C.* were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in county *C.*; that by mistake he erased the words *county of C.*; and that testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of *C.* *Miller v. Travers and Others.*

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8. *Quære*, [Whether pregnancy and imminent delivery be a cause for

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the examination of a witness by the prothonotary, under 1 *W. 4. c. 22.*

If so, it must be shewn by affidavits of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause. *Abraham v. Newton.* Page 274

9. From a covenant in the Defendant's lease, to contribute with other occupiers of the lessor's property a rateable proportion of the expense of keeping up paths used in common between them, coupled with the fact that the Plaintiff had always used a path between his house and the Defendant's from a period anterior to the Defendant's lease, and that there was no other path to which the covenant could apply, the Court inferred, that the soil of the path, which was included in the demise to the Defendant, was demised subject to a right of way in the Plaintiff. *Oakley v. Adamson.* 356

10. A general release by a creditor to a bankrupt is not sufficient to render the bankrupt a competent witness for the creditor, where the result of his testimony would give the creditor a right to prove under the commission. The creditor ought also to give a release to the assignee of all claim on the bankrupt's estate, and the bankrupt ought to release his claim to a surplus. *Perryman v. Steggall and Another.* 369

11. In an action for criminal conversation, the letters of the wife

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to her husband and others are admissible in evidence to shew the state of the wife's feelings, although they may also state a fact which would not strictly be evidence. *Willis v. Bernard.*

Page 376

12. The declarations of a shopman are not evidence against his employer, unless made in the course of his employer's business. *Garth v. Howard and Another.* 451

EXECUTION.

See LANDLORD AND TENANT, 1.

- A party discharged from arrest on giving security, cannot be arrested again if the security turn out to be worthless, unless he has been guilty of fraud. *Wilson v. Hamer.* 54

FALSE JUDGMENT.

See COURT OF REQUESTS. PRACTICE, 13.

FINE.

1. A fine on paper from *Jamaica*, where no parchment could be procured, allowed to pass, being copied on parchment and attached to the paper. *King, Demandant; Gibson, Deforciant.* 4
2. A fine was taken in the *West Indies*, by commissioners under a *dedimus potestatem* duly acknowledged: the præcipe and concord were signed by the commissioners,

and the usual affidavit made by one of them; but one of the commissioners omitted to endorse his name on the *dedimus*.

Held, that the fine might pass notwithstanding. *Markham, Plaintiff; Bayley, Deforciant.*

Page 18

FOREIGN JUDGMENT.

In order to sustain a suit in *England* for damages awarded by an Admiralty Court abroad, the transcript of the proceedings in the Admiralty Court should shew expressly, and not by mere inference, the sentence of the Admiralty Court, and that the Defendant was within its jurisdiction. *Obicini v. Bligh.* 335

GUARANTY.

See SURETY.

1. Declaration that *C. K.* was indebted to the firm of *B. and S.*; that Plaintiff had been appointed by the Court of Chancery receiver of the debts of the firm, whereby *C. K.* became liable to pay Plaintiff when requested; that in consideration of the premises, and that the Plaintiff as such receiver would give *C. K.* two months' time to pay, Defendant promised to pay in case *C. K.* omitted to do so within that time. Breach, that *C. K.* omitted, and that Defendant never paid: Held, on

on arrest of judgment, that sufficient authority appeared for the Plaintiff to contract and sue, and sufficient consideration for the Defendant's promise. *Willatts v. Kennedy.* Page 5

INSOLVENT.

See PRACTICE, 1.

1. A discharged insolvent is not exonerated from the claim of a surety, who pays subsequently to the discharge a debt due before. *Powell v. Eason.* 23
2. *A.*, being distrained on for rent arrear, applied to Defendant, to whom he was already indebted, to advance him money; Defendant refused to do so unless upon security; whereupon *A.* assigned to him all his personal estate and effects in trust to pay Defendant and other creditors: Held, not a voluntary conveyance within 7 G. 4. c. 57. s. 32. *Arnell the Younger v. Bean and Another.* 87
3. It is too late to move to bring up an insolvent under the compulsory clause of the Lords' Act on the seventh day of term. *Acraman v. Harrison.* 154
4. A prisoner brought up under the compulsory clause of the Lords' Act, allowed time, on an allegation that he had petitioned the insolvent debtors' court. *In the Matter of Payne, a Prisoner.* 194

INSURANCE.

1. A policy on ship at and from *Bristol to London*, attaches during the vessel's stay at *Bristol*; therefore, where the assured did not sail till three months after the execution of the policy, Held, that the delay was a material variation of the risk. *Palmer v. Marshall.* Page 79
2. Homeward policy on freight, at and from *Algoa*, attaches, when the ship is at *A.* in a condition to begin to take in her homeward cargo. *Williamson v. Innes.* 81
3. Defendant executed, 28th of *February* 1824, a policy of assurance on freight from *Sincapore to Europe*, with liberty to sail to, touch, and stay at, any places whatsoever, to load, unload, reload, and for all necessary purposes whatever. The ship sailed from *London* in *September* 1823, and having been detained by the captain for his own purposes at *Van Dieman's Land*, did not arrive at *Sincapore* till the 30th of *March* 1825; she sailed thence on the voyage insured the 3d of *May* 1825:
Held, that by so long a postponement of the risk the Defendant was discharged, a jury having found the delay unreasonable. *Mount v. Larkins.* 108
4. Plaintiff, owner and captain of a ship, agreed by charterparty to proceed to the *Cape*, and having delivered goods there, to proceed
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with all convenient speed to *Bombay*, where the freighter engaged to put on board a cargo of cotton for *England*. The Plaintiff was to have the cabins and between decks for his own benefit. Plaintiff arrived at the *Cape*, and might have proceeded on his voyage in two days, but he remained there ten, taking in cattle for the *Mauritius* on his own account: he went round by the *Mauritius* in his way to *Bombay*, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct. Other ships had arrived in the mean time. The freighter refused to load; and in an action on the charterparty, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the Defendant, a new trial was refused. *Freeman v. Taylor*. Page 124

5. The announcement in the *foreign* lists filed at *Lloyd's* of the sailing of a ship out of the port from which she is insured, does not dispense with the assured's disclosing a letter received from his captain before the policy is effected, announcing the day of his intended departure. *Elton v. Larkins*. 198
6. Insurance *January* 28th, on a vessel afloat, at and from *Bristol* to *London*. The vessel sailed on the 17th of *May*:

Held, that the delay, unaccounted for, was unreasonable,

and discharged the underwriter, although the vessel was of a species which does not usually sail in the winter. *Palmer v. Marshall*. Page 317

7. Upon the ebbing of the tide, a vessel took the ground in a tide harbour, in the place where it was intended she should; but, in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged: Held not a stranding for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded. *Kingsford v. Marshall*. 458

JUDGMENT.

See EVIDENCE, 1. PRACTICE, 8. 17.

JUDGMENT AS IN CASE OF NONSUIT.

See PRACTICE, 11.

LANDLORD AND TENANT.

See EVIDENCE, 5, 6.

1. As against an execution creditor, a landlord is entitled to a full year's rent, although he has been used to remit some portion of it to

to his tenant. *Williams v. Lewsey.* Page 28

2. "Sept. 21. 1829.

"K. agrees to let, and P. to take, a house in its unfinished state, for the term of sixty years, being the whole term that K. has the same leased to him, at the rent of 525*l.* payable quarterly, the first payment to be made for the half quarter at *Christmas* next; P. to insure the premises, and to have the benefit of an insurance lately paid: a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants, and agreements K. entered into in the lease granted to him."

Held, an actual demise, and not a mere agreement for a lease. *Doe d. Pearson v. Ries and Knapp.*

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MEMORANDA, 139. 467.

MONEY HAD AND RECEIVED.

The sheriff sold goods under a *fi. fa.*, without notice of a previous act of bankruptcy by the Defendant, and paid over the proceeds of the sale to the Plaintiff upon an indemnity: Held, that the Defendant's assignee might properly sue the sheriff in an action for money had and received. *Young, Assignee of Young, a Bankrupt, v.*

Marshall and Poland, Sheriff of Middlesex. Page 43

NEW TRIAL.

See COSTS, 1.

Defendant's attorney had notice, Nov. 26th, that his cause was set down for trial; five days afterwards it was called on and tried as an undefended cause, no one appearing for the Defendant.

The Defendant's attorney having on the day of trial delivered no briefs, the Court refused a new trial upon any terms. *Gwilt v. Crawley.* 144

PARTICULAR.

See PRACTICE, 15. 18.

PARTNER.

In July 1820 *W.* advanced to *S.* and *S.*, then carrying on business in partnership as brewers, the sum of 24,000*l.*, and all three executed a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property; *W.* however was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get 2000*l.* or 2400*l.* a year, as the case

case might be, out of the clear profits: *W.*'s name never appeared to the world as a partner:

Held, that *W.* was a partner; and the new firm having become bankrupt in 1826, held, that the creditors of the old firm and the creditors of the new firm were both entitled to prove against the property of the new firm. *Ex parte Chuck, in the Matter of Starkey and Another, Bankrupts.* Page 469

PLEADING.

See RENT-CHARGE, 1. TRESPASS, 1. ADULTERY. AMENDMENT, 2.

1. Plaintiffs declared as assignees, but assigned a breach in non-payment to them, assignees as aforesaid, instead of as assignees as aforesaid: Held, sufficient on special demurrer. *Cobbett and Others, Assignees of Baker, a Bankrupt, v. Cochran.* 17

2. The declaration stated that Defendants *A., H., and C.* broke a close of the Plaintiff abutting on a close of the said Defendant. The Plaintiff's close abutted on a close of the Defendant *A.*: Held, an ambiguity, and not a variance. *Walford v. Anthony and Others.* 75

3. It is no ground for a plea in abatement, that a Defendant, sued as a Scotch peer, is also described as having privilege of parliament. *Cantwell v. Earl of Stirling.* 174

4. Replevin. Defendant avowed that the rent was payable at *Martinmas*, to wit, Nov. 23.:

Held, that this must be taken to mean *New Martinmas*; and Plaintiff having shewn that the rent was in fact payable at *Old Martinmas*, the Court refused to set aside a verdict given for him. *Smith v. Walton and Another.*

Page 235

5. The county in the margin of the declaration held a sufficient venue, on special demurrer. *Duncan v. Passenger.* 355

6. A plea in abatement by an Earl of misnomer in his title of dignity must allege positively, and not merely by inference, that he was Earl at the time of suing out the writ. *Digby v. Alexander.* 416

7. To debt on a judgment, the Defendant pleaded a release of December 1831, destroyed by accident. Upon affidavit that the plea was false, the Court allowed the Plaintiff to sign judgment as for want of a plea. *Smith v. Hardy.* 435

PONE.

See PRACTICE, 5.

PRACTICE.

See PRIVILEGE, 1. EVIDENCE, 3. 8.

1. Plaintiff issued a mandate to the officer of a liberty, to arrest the Defendant on a *ca. sa.* Defendant was afterwards discharged, under the insolvent debtors' act, from the custody of the sheriff of the county. The Plaintiff having become the assignee under the discharge, Held, that he was estopped to rule the officer of the liberty

- liberty to return the mandate for the capture of the Defendant. *Hepworth v. Sanderson.* Page 19
2. Defendant, upon certain terms favourable to Plaintiff, was allowed to have a special jury after the cause had stood for trial by a common jury during a whole sittings, and had been twice postponed at the instance of the Defendant. *Thorne v. Marquis of Londonderry.* 26
3. Practice as to Elisors. *Mayor and Corporation of Norwich v. Gill.* 27
4. The Court refused to discharge the rule for a special jury, on the ground that the Defendant had obtained it in *January* 1831, and up to the *Michaelmas* term following had omitted to strike the jury, although the cause stood for trial in *July.* *Andrews v. Thornton.* 64
5. The cause assigned at the end of a writ of *pone* is mere form, and cannot be traversed by the sheriff. *Talbot v. Binns and Another.* 71
6. By the *Bath* court of requests act, a Plaintiff who sues in another court for a debt he might have recovered in the *Bath* court, shall not, by reason of a *verdict* for him, be entitled to costs.
- This Court refused to stay proceedings before verdict, upon payment of debt without costs, upon the ground that the action ought to have been brought in the *Bath* court. *Meredith v. Drew.* 141
7. In an action on a policy of insurance, the Court refused upon a new trial to change the *venue* from *Dorset* to *London*, upon the ground that both the parties lived in *London*, and that all the witnesses came from *London* on the first trial. *Palmer v. Marshall.* Page 155
8. Judgment of *non pros* cannot be signed for omission to deliver particulars pursuant to a Judge's order. *Sutton v. Clark.* 165
9. A petitioning creditor attending commissioners of bankrupt, is protected from arrest, *eundo morando et redeundo.*
- If he shews that he is on his way home, it is for the party who arrests to prove a deviation. *Selby v. Hills.* 166
10. A party has, in general, four days' time to plead after judgment of *respondeat ouster.* *Cantwell v. Earl of Stirling.* 177
11. When the Plaintiff gives notice of trial a term earlier than the rules of court require, if he omits to try pursuant to his notice, the Defendant may move for judgment, as in case of a nonsuit, the next term. *Howell v. Powlett.* 272
12. An undertaking for a bail-bond given to the sheriff by the Defendant's attorney, being a mere nullity, an application by Defendant to set it aside and enter a common appearance, was discharged with costs, though Defendant was a feme covert. *Lewis v. Knight.* 271
13. Entitling affidavit in false judgment. *Watson v. Walker.* 315
14. Omission

14. Omission in notice of bail to describe the bail as householders or freeholders, does not, under the rule of *Trinity* 1831, authorise the Plaintiff to take an assignment of the bail-bond. The objection should be made when the bail come up. *Bell and Another, Assignees of the Sheriff of Middlesex, v. Foster and Others.* Page 334
15. A particular of demand is not to be construed so rigidly as to non-suit a plaintiff for inaccuracies which could not mislead. *Disbursements* held recoverable under an item for "cash advanced." *Harrison v. Wood.* 371
16. The payment of costs for not proceeding to trial is not a condition precedent to ulterior proceedings, unless so specified in the rule. *Wilson v. Collins.* 374
17. The Defendant being in a condition to enter judgment of *non pros* for want of a declaration, the Plaintiff, with a view to prevent the *non pros*, obtained a rule to discontinue on payment of costs; however, instead of paying costs or discontinuing, as soon as the rule had expired, he served the Defendant with a declaration: Held a fraud on the proceedings of the Court; and the Defendant having entered up judgment of *non pros*, the Court refused to set it aside. *Ariel v. Barrow.* 375
18. Plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to Defendant in their trade of *brewers*. A verdict having been given for Plain-

- tiff, on proof of delivery of spirits, Defendant obtained a rule *nisi* for a nonsuit, on the ground that he had been surprised by the variance between the particular and the proof; it appearing, however, that he had been neither surprised nor misled, the Court discharged the rule. *Lambirth and Another v. Roff.* Page 411
19. Practice, as to protection of sheriff. *Parker and Others v. Booth.* 85

PRESENTATION.

An advowson belongs to a prebendary in right of his prebend: the church becomes vacant, and prebendary dies without having presented: the presentation belongs to his personal representative, according to the opinion of six Judges out of eight, delivered in the House of Lords. *Mirchouse and Another, who have survived George Bishop of Lincoln, Plaintiffs in error, v. Rennell Ws. Defendant in error.* 490

PRESCRIPTION.

See TOLLS.

PREBEND.

See PRESENTATION.

PRIVILEGE.

Defendant having voted at the election of *Scotch* peers, Held, as a *Scotch* peer, entitled to be discharged from arrest, although his vote had been protested against, his

his claim to the title disputed, and never recognised by the House of Lords or at Court. *Digby v. Lord Stirling.* Page 55

PROOF OF DEBT.

See PARTNER.

RECOVERY.

1. Recovery amended by transposing the names of demandant and tenant. *Hamilton, Demandant; Farrer, Tenant; Wilson, Vouchee.* 10
2. *Booty, Demandant; Cameron, Tenant; North and three Others, Vouchers.* 18

REGULÆ GENERALES.

288. 466

RENT-CHARGE.

Defendant made cognizance in replevin, under a power of distress for an annuity granted by G. T. to H. in September 1806. Plaintiff pleaded that in May 1806, G. T., for securing another annuity, and in consideration of 3000*l.*, granted, bargained, sold, and demised the premises in which, &c. to F. for ninety-nine years :

Held, no bar, without alleging entry by F., or that F. elected that the deed should enure by way of bargain and sale.

Held, also, that standing crops cannot be taken under a power to distrain for the arrears of an annuity. *Miller v. Green.* 92

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RELEASE.

See EVIDENCE, 10.

The Plaintiff and other creditors of the Defendants signed resolutions for entering into a composition deed with the Defendants, upon their property being assigned to trustees for the payment of the creditors.

The Defendants and their trustees having refused to allow the Plaintiff to come in as a creditor under the deed, Held,

That he might sue Defendants notwithstanding the execution of the resolutions. *Garrard v. Woolner and Another.* Page 258

REVOCATION.

See DEVISE, 2.

RIGHT OF WAY.

See EVIDENCE, 9.

SAVINGS BANK.

Since 9 G. 4. c. 92. an action does not lie against the trustee of a savings bank. In case of disputes, the only mode of proceeding is by arbitration. *Crisp v. Bunbury, Bart. and Others.* 394

SET OFF.

See COSTS, 2, 3. 7.

By order of *Nisi Prius*, a verdict having been entered for the Plaintiff,

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tiff,

tiff, and the Plaintiff having therein agreed to pay the Defendant 70*l.*, the Court allowed that sum to be set off against the Plaintiff's judgment. *Newton v. Newton.*

Page 202

SHAM PLEA.

See PLEADING, 7.

SHERIFF.

See MONEY HAD AND RECEIVED.
PRACTICE, 19.

SPECIAL JURY.

See PRACTICE, 2. 4.

STAMP.

A mortgage deed for 3000*l.* contained a power of sale and leasing to secure the principal and all expenses, with interest; there was also a covenant to pay principal and interest, and all expenses, with interest on the amount of them:

Held, not a security for an uncertain and indefinite amount under 55 G. 3. c. 184. and that a 9*l.* stamp was sufficient. *Doe d. Scruton v. Snaith.*

146

STATUTE OF LIMITATIONS.

1. Defendant, by a deed reciting that he was indebted to Plaintiff and others, assigned his property to Plaintiff, in trust to pay 6*s.* 8*d.* in the pound to all such creditors as should sign the schedule of debts annexed; provided that if

all did not sign, the deed should be void. Plaintiff never signed, nor was the amount of his debt stated:

Held, not a sufficient acknowledgment to take Plaintiff's debt out of the statute of limitations, although it was admitted orally that he had but one debt. *Kennett v. Milbank.*

Page 38

2. Under 9 G. 4. c. 14. payment of interest within six years by one of several joint contractors takes a debt out of the statute of limitations as against all. *Wyatt v. Hodson.*

309

STRANDING.

See INSURANCE, 7.

SUBMISSION.

See ARBITRATION.

SURETY.

Defendant guaranteed the payment of porter to be delivered by Plaintiff to *J.*: the guaranty contained no stipulation as to the credit to be given to *J.* The custom of the Plaintiff was to give six months, and then, sometimes, to take a bill at two. The Plaintiff having, without the knowledge of the Defendant, given *J.* eleven months' credit, Held, that the Defendant was discharged from his guaranty. *Coombe and Others v. Woolf.*

TIME.

TIME.

See PLEADING, 4.

TOLLS.

The corporation of *T.* having proved a prescriptive right to tolls, Held, that it was not destroyed by a charter of *Elizabeth*, granting and confirming, among other things, all the ancient rights of the corporation, but exempting the inhabitants from toll in all places except *London* :

Held, that this exemption applied to the tolls of all other places (except *London*), but not to the tolls of *T.* *Mayor and Burgesses of Truro v. Reynolds.* Page 275
Same v. Bastian. id.

TRESPASS.

1. Trespass for entering Plaintiff's close. Plea, that certain goods of Defendants' were there, and that they entered to take them, doing no unnecessary damage :

Held, ill. *Anthony v. Haney and Harding.* 186

VENUE.

See PRACTICE, 7. PLEADING, 5.

Practice as to Venue. *Scruton v. Dawson.* 28

VERDICT.

See WATERCOURSE, 1.

VOLUNTARY CONVEYANCE.

See INSOLVENT, 2.

WARRANTY.

"Received of *B.* 10*l.* for a grey four year old colt, warranted sound:"

Held, that the warranty was confined to soundness, and that, without proving fraud, it was no ground of action that the colt was only three years old. *Budd v. Fairman.* Page 48

2. 1. Some splints cause lameness, others do not ; a splint, therefore, is not one of those patent defects against which a warranty is in-operative.

2. The Defendant, having warranted a horse sound *at the time of the contract*, and the horse having afterwards become lame from the effects of splint visible when the Defendant sold him, Held, that the Defendant was liable on his warranty. *Margetson v. Wright.* 454

WATER-COURSE.

On indictment for nuisance to a public canal navigation established by act of parliament, it was found by a special verdict, among other things, that the canal was carried across a river and the adjoining valley by means of an aqueduct and

and an embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the fenders after mentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water; that the Defendants, occupiers of lands adjoining the river and brook, had, subsequently to the making of the canal, aqueduct, and embankment, heightened certain artificial banks, called fenders, constructed from time to time, as occasion required, on their respective properties, for the protection of their lands, so as to prevent the flood-water from

escaping as above mentioned, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks, as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced, many hundred acres of land would again be exposed to inundation: Held, that to enable the Court to come to any decision between the parties, it ought also to have been found, — 1. Whether the raising fenders was an ancient and rightful usage, or whether it had commenced since the construction of the canal; 2. Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course; and, 3. Whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct. *Trafford v. The King. Page 204*

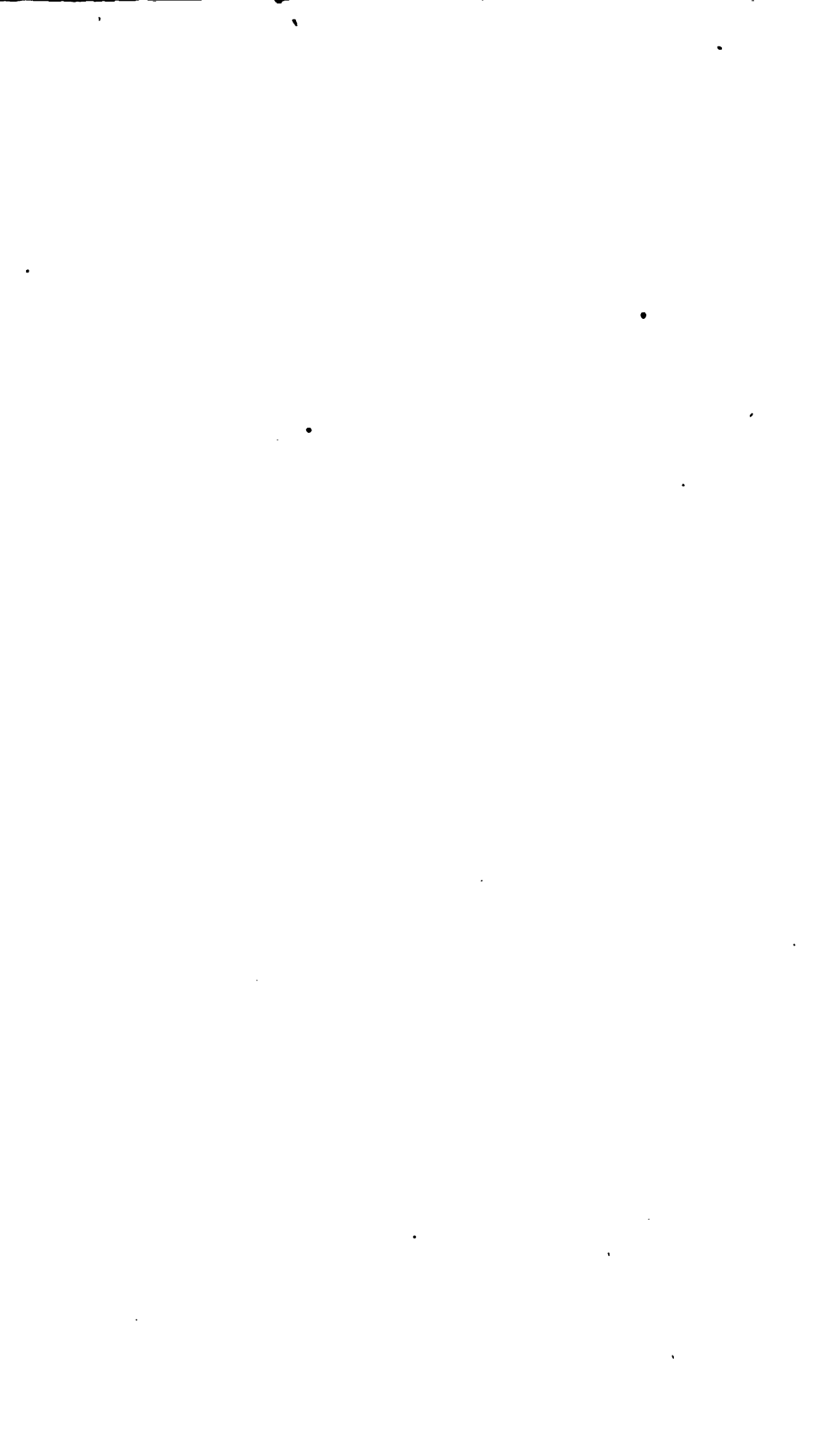
WITNESS.

See EVIDENCE, 2.

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